(25)

Office - Supreme Court, U. S.
FILED
DEC 2 1941
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM 1941

No. 777

MCLAUGHLIN LAND AND LIVESTOCK COMPANY, a corporation,
Petitioner,

vs.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, a corporation,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit
and
Brief In Support Thereof

GEORGE THOMAS DAVIS,
Mills Tower, San Francisco
Counsel for Petitioner.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

Subject Index

PETITION

	Page
Opinion of the Court Below	2
Jurisdiction	3
Summary Statement of the Matter Involved	4
Questions Presented	11
Reasons Relied Upon for the Allowance of the Writ	14

BRIEF

The Opinion of the Court	17
Jurisdiction of the Court	18
Statement of the Case	18
Specification of Errors	18
Argument	21
I. The petitioner was erroneously prevented by the District Court from sustaining the burden which the Circuit Court claimed it was required to sustain, namely, that petitioner was the owner of this property and therefore was a farming corporation	21
II. Paramount and exclusive jurisdiction having been conferred by said Section 75 upon the bankruptcy courts, the state court was without jurisdiction in the last unlawful detainer action, the findings of the Special Master erroneous, in so far as they are based upon the decision of the last unlawful detainer action, and the judgment of the District Court erroneous, in so far as it affirms such findings	31
III. Petitioner was not estopped by the judgment in its previous proceedings under said Section 75 to dispute respondent's present claim of ownership	39

Page

IV. The stipulation entered into by former counsel for petitioner and counsel for respondent to abide the outcome of the last state court unlawful detainer action and to be governed thereby, was unlawful, improvident and ineffective. The Special Master erroneously accepted said stipulation and based his recommendation of dismissal of petitioner's application upon same and the judgment rendered in said state action. The District Court erroneously refused to relieve petitioner from such stipulation 44

V. The deficiency judgment and the action to renew the same created no estoppel as against petitioner in regard to the fact of the ownership of this property 46

VI. An applicant for relief under Section 75 of the Bankruptcy Act is not required to be the owner of farming property. In any event such applicant should not be foreclosed from establishing that he is such owner 49

Conclusion 51

Table of Authorities Cited

Pages

Acme Harvester Co. v. Beckman Lumber Co., 220 U. S. 300, 56 L. ed. 208 35

Baldwin, Ex parte, 291 U. S. 610, 78 L. ed. 1020, 1023 35

Bankruptcy Act:
Section 75 ..... 21, 22, 23, 28, 30, 32, 37, 38, 39, 43, 49, 50, 51

Blumenthal v. Maryland Cas. Co., 119 Cal. App. 566, 6 Pac. 965 47

Cope, In re, 8 F. Supp. 961, 77 F. 2nd 993 34

33 Corp. Jur.:
p. 1073 41

34 Corp. Jur.:
pp. 528, 531 41
p. 768 41
p. 793 42
p. 795 42
pp. 899, 900 41
p. 955 41

Davis v. Shackleford, 91 Fed. (2d) 148-150 40
Duffy, In re, 9 F. Supp. 167-169 25
Duty v. Sternerg, 293 U. S. 470, 70 L. ed. 599 33

Eaves v. Glenn, et al., 9 F. Supp. 647-650, 651 ..... 24, 26, 29

Finn v. Carolina, etc. Co., 232 Fed. (C.C.A.) 815, 818 40

Gross v. Irving Trust Co., 289 U. S. 342, 53 S. Ct. 605, 606, 77 L. ed. 1243, 90 A.L.R. 1215 32

Isaacs v. Hobbs Tie & T. Co., 282 U. S. 734, at page 737, 51 S. Ct. 270, 271, 75 L. ed. 645 33

Pages

Jasper Bank v. Rome First Nat. Bank, 258 U. S. 112, 66 L. ed. 490 41

Koch, In re, 116 F. (2d) 243, 246 36

Lawman, In re, 8 F. Supp. 886 34

Lillis v. Emigrant Ditch Co., 95 Cal. 553, 559-560 ..... 47, 48

Louisville and Nashville Railroad Co. v. Greene, 244 U. S. 522, 61 L. ed. 1291 36

O'Brien, In re (1935; C. C. A. 2d) 78 F. (2d) 715 (affirming (1935; D. C.) 9 F. Supp. 892, 27 Am. Bankr. Rep. (N. S.) 376) 38

Palma Bros., In re, 8 Fed. Supp. 920 40

Perkins v. Perkins, 29 Cal. App. 68, 70, 54 Pac. 483 49

Peterson, In re, 8 Fed. Supp. 86 40

S. P. Co. v. Vegort, 250 U. S. 483, 39 Supreme Court 533, 63 L. ed. 1099 42

Straton v. Andy New, 283 U. S. 318, 75 L. ed. 1060 35

Thompson v. Magnolia Petroleum Co., 300 U. S. 478, 84 L. ed. 876-9 35

Tray, In re, 80 F. (2d) 9 36

U. S. Bank v. Pamp, 77 F. (2d) 9 29

Waller v. Weston, 125 Cal. 201, 204, 57 Pac. 892 49

Watts v. Sacks, 190 U. S. 1, 47 L. ed. 933 35

Weiss, In re, 10 Fed. Supp. 227-229 40

Wilkinson, In re, 10 Fed. Supp. 100 ..... 25, 37

In the Supreme Court of the United States

OCTOBER TERM 1941

No.....

McLAUGHLIN LAND AND LIVESTOCK COMPANY, a corporation,
Petitioner,

vs.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, a corporation,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The above named petitioner respectfully petitions this Honorable Court for a writ of certiorari to review

a decision and judgment of the Circuit Court of Appeals for the Ninth Circuit, entered on the 4th day of September, 1941, affirming a judgment of the United States District Court in and for the Northern District of California.

Said judgment of the District Court directed the dismissal of the application of petitioner herein for relief under Section 75 of the Bankruptcy Act.

OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit was rendered on the 4th day of September, 1941. It has not as yet been reported in the Federal Reporter. Said opinion is set forth in the record at pages 206-208, inclusive.

Said opinion, in effect, held that the burden of petitioner herein in the proceedings below was to establish at a hearing before the Special Master, to whom respondent's motion to dismiss had been referred, that said petitioner was a farming corporation. The opinion, in effect, held further, that petitioner had not sustained that burden at the hearing before said Special Master of respondent's motion to dismiss petitioner's application for relief under said section of the Bankruptcy Act.

The primary grounds of the judgment and order of the District Court were:

(a) Petitioner herein was not a farmer within the meaning of the Bankruptcy Act because it was not

possessed of any property which it might lawfully farm (R. p. 64);

(b) Petitioner was estopped by judgments in state court actions and previous proceedings of petitioner under said Section 75 from attacking the validity of respondent's claimed title to certain valuable property, the ownership of which petitioner claimed when it filed its present application for relief under said Section 75 of the Bankruptcy Act (R. pp. 64, 65, 128);

(c) The parties, through their counsel, had stipulated before the Special Master in said proceedings that petitioner's application for relief under said Bankruptcy Section should be dismissed in the event that the state court in an unlawful detainer action, then pending, should decide that petitioner did not own farming property (R. p. 127).

JURISDICTION.

The decision and judgment of the Circuit Court of Appeals was rendered on the 4th day of September, 1941, and this petition is filed within three months thereafter. The jurisdiction of this Court is invoked under Title 28, Judicial Code and Judiciary, Section 347, Subd. A (Section 240, Judicial Code as amended). The statute of the United States involved herein is Section 75 of the Bankruptcy Act (11 U.S.C.A. Sec. 203). This statute was enacted to afford agricultural debtors opportunity to seek an agreement with their

creditors or an extension of the maturity of their obligations (*Paradise Land & Livestock Co. v. Federal Land Bank of Berkeley*, 108 Fed.(2d) 832; *John Hancock Mutual Life Ins. Co. v. Bartels*, 60 Sup. Ct. 221, 84 L. ed. 154).

SUMMARY STATEMENT OF THE MATTER INVOLVED.

On December 16, 1939, petitioner herein filed in said District Court its application for relief under Section 75 of the Bankruptcy Act, together with a schedule of all its assets and liabilities (R. pp. 1-23). The petition for relief set forth that petitioner was a corporation organized and existing under the laws of California; that it was a farming corporation; that 75% of its stock was owned by farmers engaged in producing products of the soil; that the whole of its income was derived from such operations, and that the farming operations of the corporation then included the actual cultivation of and production from three hundred acres of land in barley, and two hundred fifty acres in grain, as well as the raising of chickens, turkeys, sheep and cattle for sale in the open market (R. p. 2). The schedule of its assets accompanying said petition for relief set forth the property here involved (R. pp. 12-13), the ownership of which property has been the subject of protracted litigation between the parties hereto.

The petition of petitioner for relief under said Bankruptcy Section was duly verified and, as required by said Bankruptcy Section, said petition was ap-

proved by the District Court as properly filed under said Bankruptcy Section (R. pp. 23-24). Immediately upon the foregoing order of approval by said District Court, the matter was referred to a Conciliation Commissioner, appointed by said District Court to hear and consider said application for relief. Although said section of the Bankruptcy Act clearly contemplated a hearing before said Conciliation Commissioner, no such hearing has ever been held.

Instead, respondent immediately filed its motion to dismiss appellant's application for relief, respondent contending that petitioner was not a farmer within the meaning of said Bankruptcy Act; that it, the respondent, became the owner of said farming property at a foreclosure sale held on March 26, 1932, pursuant to a deed of trust executed by petitioner herein to respondent, and that in any event, petitioner was estopped to deny the validity of said sale because of previous proceedings of respondent under said Bankruptcy Section and by reason of certain state court actions wherein, the validity of said sale is claimed to have been determined (R. pp. 26-35).

To the foregoing motion of respondent to dismiss petitioner's application for relief, petitioner herein in due time filed its answer (R. pp. 36-52). Said answer principally set forth that neither the validity of said foreclosure sale, nor the matter of ownership of said farming property, had been determined in the previous proceedings of petitioner under said Bankruptcy Section, or in any of said state court actions.

Respondent's motion to dismiss said proceedings was referred by said District Court to Paul T. Gallagher as Special Master (R. pp. 24-25). On April 2, 1939, the attorneys who were then counsel for petitioner herein and the attorneys for respondent filed with said Special Master a stipulation providing that if the state court decision in an unlawful detainer action then pending in the state courts should determine, in effect, that petitioner had no farming property, then the proceedings of petitioner under Section 75 should be dismissed (R. p. 69). Meanwhile, the motion of respondent to dismiss the proceedings of petitioner for relief under said section of the Bankruptcy Act was held in abeyance to await the outcome of said decision in the state court action then pending.

Some time thereafter the state court rendered its decision in favor of respondent (105 P.(2d) 607). That decision rested, for the most part, upon the finding that the matter of the validity of the bank's title to said property had become res adjudicata in the previous proceedings of petitioner under said section of the Bankruptcy Act (105 P.(2d) 607, 611, 612). It should be particularly observed that the state court in that decision pointed out that questions of title cannot be determined in unlawful detainer actions such as was then pending between the parties and as was then finally decided by said state court (105 P.(2d) 615).

Following that decision by said state court, the Special Master filed herein his report, findings and

conclusions recommending the dismissal of petitioner's application for relief under said section upon the following main grounds:

(a) Petitioner was not a farmer because it was not lawfully possessed of farming property;

(b) Respondent became the owner of the farming property in the foreclosure sale.

(c) Petitioner was estopped to question the validity of respondent's title to said property by reason of the judgments in a state court deficiency action commenced after said foreclosure sale; in the action to renew the judgment obtained in said deficiency action; that it was further estopped to question said title by reason of the judgment in the last state court unlawful detainer action (105 P.(2d) 607), the judgment in the previous proceedings of petitioner under said Section 75 of the Bankruptcy Act, and by virtue of the stipulation entered into between former counsel for petitioner and counsel for respondent stipulating that petitioner's present application for relief under Sec. 75, should be dismissed in the event that the state court in the last unlawful detainer action should determine that petitioner was not the owner of the farming property (R. pp. 64-65).

On December 19, 1940, petitioner filed its exceptions to said Special Master's report, findings and conclusions (R. p. 77). On December 21, 1940, petitioner filed its motion and accompanying affidavit to be relieved from said stipulation of counsel heretofore referred to upon the ground that said stipulation

was entered into unlawfully and improvidently (R. pp. 94-106).

On January 9, 1941, the Special Master's findings and conclusions were approved by said District Court and judgment of dismissal of petitioner's proceedings was thereupon ordered by said District Court. At the same time the motion of petitioner to be relieved from the foregoing stipulation of counsel was denied (R. p. 126).

From the order and judgment of said District Court dismissing petitioner's proceedings under said section of the Bankruptcy Act and denying petitioner's application to be relieved from the foregoing stipulation an appeal was taken to the United States Circuit Court of Appeals for the Ninth Circuit. Said Circuit Court affirmed the order and judgment of said United States District Court upon the ground heretofore pointed out that petitioner had not sustained its burden of proving that it was farming corporation, to wit: the owner of this farming property.

To be further informative as to the background of this petition, the following history of the extended controversy between the parties is briefly referred to.

The obligation which gave rise to the protracted litigation was incurred by petitioner on March 17, 1931. On that date petitioner was the owner of extensive farming land in Monterey County, California, including the six hundred acre tract herein involved and which is listed in the schedules as an asset of petitioner. On said March 17, 1931, petitioner exe-

cuted to respondent its promissory note in the sum of $173,800. To secure the payment of said note, petitioner deeded its entire farming property, including the six hundred acre tract listed in petitioner's schedules, to Corporation of America as trustee for respondent. Owing to the economic depression petitioner defaulted in the payment of said note. A sale of said property under the terms of said deed of trust was noticed by said trustee for March 26, 1932 (94 Fed.(2d) 491). Respondent claims to have become the purchaser of said property at said sale for the sum of $80,000 (R. p. 55). The fact of said sale, as well as its validity, has been continuously the subject of dispute between said parties. Said sale purports to have been made by one not authorized under the law to make or conduct such sale (94 Fed.(2d) 491, 492).

On May 27, 1932, respondent commenced its first unlawful detainer action to dispossess petitioner. Judgment was rendered in favor of petitioner herein. In April, 1933, action for the balance alleged to be remaining unpaid upon said promissory note was commenced by the assignee of respondent (R. p. 56). Respondent had judgment therein. Subsequently respondent commenced action to *renew* the deficiency judgment. On July 11, 1933, a second unlawful detainer action was instituted by respondent against petitioner. In that action petitioner again had judgment (22 Cal. App.(2d) 411; 71 P.(2d) 291).

On March 9, 1936, petitioner filed its first petition in said District Court for relief under said Section 75

of the Bankruptcy Act. In those proceedings, as in the instant one, respondent moved for a dismissal, and after a hearing before and recommendation by the Special Master therein, said District Court directed the dismissal of said petition.

The District Court there held (1) that it was without jurisdiction because of the corporate incapacity of petitioner, and (2) petitioner was not the owner of farming property (94 F.(2d) 491). That judgment of dismissal was affirmed by the Circuit Court of Appeals, Ninth Circuit, solely upon the ground of the then existing corporate incapacity of petitioner, petitioner having failed to pay its state franchise tax (94 F.(2d) 491). Said Circuit Court in that decision did not presume to determine either the validity of the foreclosure sale or the question whether petitioner or respondent was the owner of the property.

Following said decision by said Circuit Court, said respondent on January 10, 1939, commenced its third and last unlawful detainer action to dispossess petitioner. Respondent had judgment in said action as heretofore pointed out (105 P. 2d 607).

Application to this Court for writ of certiorari to review said state court decision was denied on May 5, 1941 (61 Sup. Ct. Rep. 958).

As heretofore pointed out, the Special Master and the District Court in the instant proceedings held that the previous proceedings of petitioner under said Section 75 and certain state court actions, namely, the deficiency judgment, the action to renew same and

the judgment in the final unlawful detainer suit, estopped petitioner from questioning the claim of respondent that it owned this farming property (R. p. 64).

The recent decision of the Circuit Court, it should be emphasized, peculiarly held in effect that petitioner had not established that it was the owner of farming property and therefore had not proved that it was a farmer, while the District Court and Special Master expressly determined that petitioner was *foreclosed* from even attempting to establish such fact by reason of the state and federal proceedings referred to.

QUESTIONS PRESENTED.

The following questions arise in this application for a writ of certiorari:

(1) How could petitioner establish that it was the owner of the property listed in its schedules and therefore a farmer when the District Court and Special Master held it to be estopped from making such showing by the decisions in the state court actions and the former proceedings of petitioner under said section of the Bankruptcy Act?

(2) Was not such question of ownership of such property a matter which could have been properly determined only in summary proceedings instituted in the bankruptcy court under the direction of the Conciliation Commissioner?

(3) In view of the spirit and purpose of said section of the Bankruptcy Act, was not petitioner entitled to a hearing before said Conciliation Commissioner and an opportunity at said hearing with all creditors and claimants present to procure a composition or extension of its debts?

(4) Were not the Special Master and the District Court arbitrary and in error in determining that they were controlled by state court adjudications or by former proceedings of the petitioner under said Section 75 upon the matter of ownership of said farming property?

(5) Was it not the duty of the District Court to deny the motion of respondent to dismiss, to direct that a hearing of the application of petitioner for relief be held, in accordance with the statute, before the Conciliation Commissioner, and to further direct that any question arising with reference to the ownership of said property should be determined in summary proceedings especially instituted in the bankruptcy court for that purpose?

(6) Was the foreclosure sale of the farming property valid notwithstanding the Special Master's findings in the previous proceedings of petitioner under Section 75 that the sale had been conducted by a person wholly unauthorized?

(7) Was petitioner estopped from questioning the validity of said sale by reason of the judgments in the state court actions between the parties or by the

previous proceedings of petitioner under said section of the Bankruptcy Act?

(8) Was petitioner estopped from attacking said sale by reason of the judgment in the previous proceeding of petitioner under said Section 75 in view of the fact that the District Court therein had determined that it had no jurisdiction owing to petitioner's corporate incapacity and the Circuit Court of Appeals in that particular proceeding specifically affirmed said judgment upon the single ground that petitioner was at that time incapacitated from conducting its corporate farming business? (94 Fed.(2d) 491)

(9) Was not the stipulation entered into by counsel for the parties as to the dismissal of petitioner's instant proceedings unlawful, improvident and ineffective?

(10) Was not the Special Master in error in accepting said stipulation and basing his recommendation of dismissal upon said stipulation and the asserted effect thereof?

(11) Was not the District Court in error in refusing to relieve petitioner from said stipulation and in approving the findings and recommendation of the Special Master predicated upon said stipulation and the asserted effect thereof?

(12) Is it necessary that an applicant for relief under said Section 75 should be the owner of farming property?

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

(1) In holding that the petitioner was estopped by its former proceedings under Section 75 or by state court actions to dispute respondent's claim of ownership of said farming property, the lower court decided an important question of federal law and procedure relating to said Section 75 of the Bankruptcy Act which has not yet, but which should be, settled by this Court.

(2) In holding that petitioner had not established that it was the owner of farming property, said lower court adopted a procedure in conflict with that set forth by the decisions of this Court, as well as of other Circuit and District Courts, and which procedure would ultimately divest bankruptcy courts of the exclusive authority given to courts in bankruptcy to determine themselves, and irrespective of state court actions, matters relating to the ownership of property possessed by a debtor and listed as an asset in the schedules.

(3) In holding that the former proceedings of petitioner under said Section 75 and that the state court judgments were res judicata on the question of ownership of said farming property, the lower court followed a bankruptcy procedure never before followed or approved by this Court or any Circuit Court in determining disputes over title to property claimed by a bankrupt or debtor.

(4) In holding that petitioner was foreclosed by state court actions and the former proceedings of the

petitioner under Section 75 from questioning the claimed ownership of respondent to said farming property, the judgment of the lower court was wholly arbitrary and erroneous in view of the fact that neither the state court actions nor the former proceedings of petitioner under said Section 75 made any valid determination as to the title of the property claimed herein as belonging to petitioner.

(5) In declaring, in effect, that the stipulation of counsel as to the dismissal of the application of petitioner for relief, in the event that the pending state court action should determine that respondent was the owner of the property, was a proper and lawful stipulation and one which a Special Master might properly accept and use as a basis for his subsequent recommendation of dismissal, the lower court decided an important question of federal law and followed a procedure in conflict with the decisions of other Circuit and District Courts, as well as the decisions of this Court.

(6) This case is of the utmost public importance in connection with the proper administration of Section 75 of the Bankruptcy Act. It presents important questions in that regard which necessarily should be finally determined by this Court. Such questions relate to the powers and duties of a District Court or Special Master in proceedings under said Section 75, the proper manner and procedure for determining disputed claims to property listed by a debtor, and the effect, if any, of pending or prior state court ac-

tions purporting to determine either the matter of possession or the question of title to such property. It likewise involves an important and controversial question frequently arising in debtor's proceedings and which the lower court has decided contrary to the plain provisions of the act, namely, whether a farmer must be the owner of the farming property to obtain relief under said Section 75.

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, instructing and directing that court to certify and send to this Court, for its review and determination, on a date to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, 9816, McLaughlin Land and Livestock Company, a corporation, Debtor, Appellant, vs. Bank of America National Trust & Savings Association, a corporation, appellee, and that the judgment of the Circuit Court be reversed by this Honorable Court, and that your petitioner have such other and further relief as to this Honorable Court may seem proper and just.

MCLAUGHLIN LAND AND LIVESTOCK COMPANY, a Corporation,
Petitioner.

GEORGE THOMAS DAVIS,
Counsel for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM 1941

No.....

McLAUGHLIN LAND AND LIVESTOCK COMPANY, a corporation,
Petitioner,
vs.
BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, a corporation,
Respondent.

Brief in Support of Petition for Writ of Certiorari

THE OPINION OF THE COURT.

A certified copy of the opinion of the Circuit Court of Appeals is contained in the record forwarded to

NOTE: All italics are by petitioner unless otherwise noted.

this Court by the clerk of said Circuit Court (R. p. 206-208). No opinion was written by the District Court. Its judgment is set forth at page 126 of the Record. The findings of the Special Master, which the District Court judgment approved, are set forth at pages 52 to 66 of said Record.

JURISDICTION OF THE COURT.

The jurisdiction of the court is invoked under Title 28, Judicial Code and Judiciary, section 347A (Sec. 240 Judicial Code, as amended).

STATEMENT OF THE CASE.

The essential facts are stated in the accompanying petition for certiorari and in the interest of brevity are not herein repeated. Any necessary elaboration will be made in the argument which follows.

SPECIFICATION OF ERRORS.

The United States Circuit Court of Appeals erred in the following particulars:

I.

In failing to reverse the judgment of said District Court.

II.

In failing to hold that the District Court was in error in affirming the findings of the Special Master that

petitioner was precluded from disputing respondent's claimed ownership of the property by the judgments in the state court actions between the parties.

III.

In failing to hold that the District Court was in error in concluding that petitioner was foreclosed from establishing its title to said property or disputing respondent's claimed ownership thereof by the judgment in the former proceedings of petitioner under said Section 75.

IV.

In failing to hold that the District Court was in error in affirming the procedure followed by the Special Master in accepting the stipulation of counsel to abide the outcome of a state court action and in affirming the findings and recommendation of said Special Master that petitioner's application under said section should be dismissed because of said stipulation and the asserted effect thereof.

V.

In failing to hold that said District Court and said Special Master were without jurisdiction or authority to determine the question of ownership of said property on a motion to dismiss petitioner's application for relief.

VI.

In failing to hold that the District Court was in error in refusing to deny the motion of respondent to dismiss and in refusing to direct the determination

of the question of ownership of such property in summary proceedings.

VII.

In failing to hold that such District Court was in error in refusing to deny said motion to dismiss and in refusing to direct that the matter of the application of petitioner for relief be fully inquired into and considered on its merits at a hearing before the Conciliation Commissioner, as contemplated by the Bankruptcy Act.

VIII.

In failing to hold that the District Court was in error in refusing to exercise its exclusive jurisdiction to determine questions involving title to property claimed by such debtor irrespective of pending state court actions, prior state court actions or the previous proceedings of petitioner under said Section 75.

IX.

In failing to hold that petitioner was entitled to relief under said Section 75 regardless of whether or not it owned said property.

ARGUMENT.

I.

THE PETITIONER WAS ERRONEOUSLY PREVENTED BY THE DISTRICT COURT FROM SUSTAINING THE BURDEN WHICH THE CIRCUIT COURT CLAIMED IT WAS REQUIRED TO SUSTAIN, NAMELY, THAT PETITIONER WAS THE OWNER OF THIS PROPERTY AND THEREFORE WAS A FARMING CORPORATION.

In the latter part of this argument we will call the attention of the court to the fact that at the time of the filing of petitioner's present application for relief under said Section 75 the question of whether petitioner or respondent owned the farming property had never been an issue and in fact had never been determined in any state court action or in the previous proceedings of petitioner under said Section 75. We shall be able there to establish that such state court unlawful detainer actions determine no issue relating to title to property; that the deficiency action between the parties contained no issue respecting title and that the only valid determination in the former proceedings of petitioner under Section 75 was that petitioner had no corporate capacity at the time, and therefore the court in those proceedings was without jurisdiction to hear the application for relief under said Section 75. (94 Fed. 2d 491)

But irrespective of whether our contentions with reference to the effect of such state court actions or the former proceedings of petitioner for relief under said Section 75 are with or without merit, is of no

controlling importance upon this application. This petition for certiorari is primarily directed to the fundamental contention that in the present proceedings the Special Master and the District Court followed a procedure in administering Section 75 of the Bankruptcy Act not heretofore recognized or sanctioned by the decisions of this Court or the decisions of any Circuit or District Court. In this regard we have pointed out that the Bankruptcy Court believed itself controlled by previous and pending state court actions between the parties as well as the previous proceedings of petitioner under said Section 75, that therefore your petitioner could not dispute respondent's claim of ownership, and that for such reasons respondent's motion to dismiss must be granted.

Because of the fact that the Special Master and the District Court were clearly erroneous in such conclusion and therefore pursued a course in this matter which was wholly arbitrary and contrary to law, petitioner was prevented from seeking to establish the very fact that the Circuit Court determined it had failed to establish, namely, that it was the owner of farming property and therefore was a farming corporation.

In its application for relief under said Section 75 petitioner alleged that it was a farming corporation. Moreover said application set forth facts establishing that petitioner was then actively engaged in farming operations (R. p. 2). The schedules of assets accompanying said application listed the very property, the ownership of which the decision of the Circuit Court

decided petitioner failed to establish (R. pp. 12, 13). Under the regular procedure contemplated by Section 75 of the Bankruptcy Act, this petition was approved for filing by the District Court and immediately referred to a Conciliation Commissioner (R. p. 1). No hearing has ever been held before said Conciliation Commissioner as the statute required.

Instead, the motion of respondent to dismiss was referred to and heard before a Special Master. The conclusion of the Special Master after a consideration of the records of the state court actions and the previous proceedings of petitioner as a debtor, approved by the District Court, was that the petitioner was foreclosed upon this issue of ownership of said property by such state court actions, one of which was pending at the time petitioner filed its application for relief, and by said previous proceedings of petitioner under said Section 75 (R. p. 64). Having so concluded the lower court then held that although petitioner was in the possession of the property and actively farming it, it was not the owner thereof and therefore was entitled to no relief under said Section 75 (R. p. 65).

It is respectfully submitted that the Special Master and the District Court misconceived their jurisdiction and authority in arbitrarily concluding upon the basis of such state court actions or the former proceedings of the petitioner that petitioner did not own the farming property and therefore was not a farming corporation. Neither the past actions between the parties

nor the then pending state action was to any extent controlling upon said Special Master or the District Court upon the hearing of respondent's motion to dismiss.

As pointed out by the court in

Eaves v. Glenn, et al., 9 F. Supp. 647-650, 651,

> "Primarily this act of Congress is for the benefit of farmer debtors. Creditors under it are not merely those who have money demands against the farmer, debtor, but who have any kind of claims against him. Defendant here, after crediting the amount bid for the property, has a deficiency judgment against these debtors. In each case they are seeking possession of the lands involved, and, in order to realize upon the foreclosure judgments and sales and perfect in themselves such titles as they may convey and be acceptable to others, they must take further legal proceeding in state court against the debtors. However secure defendants may be as to their legal rights in the premises, it is my view that Congress intended, in just such situations, that the farmer be given an opportunity, in a hearing before the *conciliation commissioner*, with all his creditors and claimants present to procure a composition or extension of his debts. The theory seemed to be this: Even though litigation had commenced and sales occurred, in such a conference or hearing concessions might be made and the farmer helped and enabled to carry on. Certainly the defendant here could voluntarily undo what has been done. In a hearing before the conciliation commissioner, a settlement might be

reached that would better serve the interests of all parties. I do not know. Anyway, Congress intended that the opportunity to do so be afforded, even in an *extreme* case like this.

"These being my views as to the effect of the statute upon the situation of these parties as we find them under the undisputed facts, I will *overrule the defendants' motion to dismiss* and refer these matters to the conciliation commissioners of Palmer and Floyd Counties, with directions that the *usual* proceedings in such matters be had in these cases."

To the same effect:

In *Re Wilkinson*, 10 Fed. Supp. 100.

To the same effect also is the recent decision of

In re Duffy, 9 F. Supp. 167-169.

Therein, the court declares:

"Subdivision (n) of section 75 of the Bankruptcy Act (11 U. S. C. A. sec. 203 (n) provides that the filing of petition for relief under section 75 shall subject the farmer and his property wherever located to the 'exclusive jurisdiction of the court.' This is in accord with the logic of the opinions of the Supreme Court in the case of Gross v. Irving Trust Co., 289 U. S. 342, 53 S. Ct. 605, 77 L. Ed. 1243, 90 A. L. R. 1215, and Isaacs v. Hobbs Tie & Timber Co., 282 U. S. 734, 51 S. Ct. 270, 75 L. Ed. 645. It is clear from these cases that, while the court must recognize the constitutional provisions which protect one's life, liberty and property, and thus preserve all such

rights as existed at the time bankruptcy intervened, yet when, how, and where such rights shall be enforced lies *wholly* within the *jurisdiction* of the *bankruptcy* court under its paramount jurisdiction under the Constitution. See In re Jacobs (D. C.) 7 F. Supp. 749.

"It follows therefore that, when this debtor, in pursuance of the act of Congress giving him the right so to do, filed his petition that jurisdiction of all his property be taken over by this court, it became the court's *duty,* under the mandate of Congress, to exercise '*exclusive* jurisdiction.' Such is the law as made by the Congress, and that it is within the constitutional power of Congress the Supreme Court has clearly stated in Isaacs v. Hobbs Tie & Timber Co., supra, and Gross v. Irving Trust Co., supra. It remains for the court, in pursuance of its jurisdiction, to determine at what time, in what court, and by what procedure the mortgagee shall have its rights protected. All the debtor's property is within the custody and control of the court, including his equity of redemption or right to redeem, said by the Supreme Court of Illinois to be the same after sale as before sale."

In ***Eaves v. Glenn, et al.,*** supra, the court also pertinently stated:

"I am impressed that it was the intention of Congress that, all such legal proceedings, after the filing of the petitions in bankruptcy by these plaintiffs, were conditionally denied to the defendant. I do not see why the very appearances in these equity cases, and making the *motions* to *dismiss* the proceedings, and filing the answers to

the merits, are not also denied to defendant, in the absence of a petition made to and granted by this court, after a hearing and report by the *conciliation commissioners,* etc., as is provided in paragraph (o) of section 75. The fact that the proceedings in Bell County were instituted prior to the filing of such petitions in bankruptcy gives no right whatever to pursue those proceedings to a finality, except in a prescribed way. As far as the intent of Congress is concerned, nothing could be made plainer. The provisions of paragraph (o) are too plain for construction that, whether such a state suit has been filed before or after the farmer's petition in bankruptcy, all proceedings in court or otherwise, against the farmer or his property, must stop until certain things have been done, and certain things have happened, none of which have been done, and none of which have happened here. Subdivision (2) of paragraph (o) makes it plain to my mind that it is *not* even necessary for the question of *title,* or divestiture of title, to be involved, but that it is only necessary for a question of the recovery of the possession of land to be involved. Certainly whatever additional proceedings might take place in the Bell County suit, looking to a completion of the title in the plaintiff Glenn in that suit, or placing him in possession of the lands in question, would be proceedings that are intended to be *inhibited* by this act. I think, without permission, any further proceedings in the Bell County suit would be in violation of several of these numbered subdivisions of paragraph (o)."

The foregoing authorities should suffice to indicate to this Court that the District Court was clearly in

error in concluding that as to the real property listed in the schedules it was bound by any doctrine of estoppel or res adjudicata arising from state court actions or former proceedings of petitioner under Section 75. For the same reason, the error of the Circuit Court of Appeals becomes indeed obvious in concluding that petitioner had failed to establish that it owned such property and was a farmer. Petitioner was prevented from establishing such very fact because the District Court ignored the plain wording, spirit and purpose of Section 75 and erroneously refused to avail itself of the exclusive jurisdiction conferred upon it by that section. The pertinent subsections of said Section 75 follow:

Subsection (n) provides "The filing of the petition * * * shall immediately subject the farmer and all his property to the exclusive jurisdiction of the court, including *all* real or personal property * * *"

The section then points out that the jurisdiction of the courts and the rights of creditors "shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day * * * the petition was filed".

Subsection (o) prohibits the filing or prosecution of certain state court actions there referred to.

Subsection (p) extends this prohibition to all courts, state and Federal, to all creditors and provides that all the debtor's property shall be under the sole jurisdiction and control of the Bankruptcy Court.

It has repeatedly been held that the exercise of such exclusive jurisdiction may not in any way be frustrated, modified or impeded by any actions of a state court. Nor may such jurisdiction be changed or waived by an improvident consent or stipulation of counsel such as was entered into in these proceedings (R. p. 68).

> "Congress intended that the filing of such a petition in bankruptcy by the farmer was to be a *caveat* to all the world that all legal proceedings against the farmer either to divest him of the title to property or of the possession of property should *cease* upon the filing of such bankruptcy petition and that thereafter the farmer's rights with respect to the title or possession of property, as well as the right of all his creditors, should be submitted to and passed upon by the *bankruptcy court* to the exclusion of all other courts."

Eaves v. Glenn, et al., 9 F. Supp. 647-648.

> "Subdivision (n) of Section 75 of the Bankruptcy Act purports to subject the farmer and his property, wherever located, to the exclusive jurisdiction of the bankruptcy court * * * This was sufficient to give the bankruptcy court power to hear and determine all questions respecting title, possession or control of the property in a summary manner. Murphy v. Hofman, 211 U. S. 562, 53 L. ed. 327; Page v. Natural Gas Corporation, 286 U. S. 269, 76 L. ed. 1096; McDaniel Nat. Bank v. Bridwell (C. C. A.-8) 65 Fed. (2d) 428. * * *"

U. S. Bank v. Pamp, 77 F. (2d) 9.

The foregoing doctrines have found frequent application in the federal courts, as will present appear. These decisions overwhelmingly establish that upon controlling jurisdictional grounds the decisions in the state court actions, as well as the judgment in the former proceedings of the petitioner under Section 75, were in no sense controlling upon either the District Court in its consideration of petitioner's present application for relief under said Section 75. The foregoing decisions likewise fully indicate the impropriety of the procedure following herein by the Special Master and the District Court whereby petitioner was foreclosed upon authority of prior and pending state court proceedings from disputing respondent's claim of ownership.

It seems too obvious for extended comment that both the Special Master and the District Court misconceived their powers and jurisdiction in relation to this present application of petitioner for relief under said Bankruptcy Act. A proper performance of those functions entailed no arbitrary finding upon the hearing of such motion to dismiss, that respondent's pleas of res adjudicata and estoppel, arising from the state court actions or from the former proceedings of the debtor, were well taken or that the court was without jurisdiction to proceed with petitioner's application. The proper administration of Section 75 of the Bankruptcy Act in this instance warranted only a denial of the motion of respondent to dismiss, a hearing upon the merits before the Conciliation Commissioner as

the statute contemplated, and thereafter a determination of respondent's claim of ownership, in summary proceedings instituted for that very purpose.

II.

PARAMOUNT AND EXCLUSIVE JURISDICTION HAVING BEEN CONFERRED BY SAID SECTION 75 UPON THE BANKRUPTCY COURTS, THE STATE COURT WAS WITHOUT JURISDICTION IN THE LAST UNLAWFUL DETAINER ACTION, THE FINDINGS OF THE SPECIAL MASTER ERRONEOUS, IN SO FAR AS THEY ARE BASED UPON THE DECISION OF THE LAST UNLAWFUL DETAINER ACTION, AND THE JUDGMENT OF THE DISTRICT COURT ERRONEOUS, IN SO FAR AS IT AFFIRMS SUCH FINDINGS.

This Court has been advised that at the time respondent's motion to dismiss petitioner's application for relief was filed there was pending a state court unlawful detainer action commenced by respondent to dispossess petitioner from this property. Upon authority of the judgment thereafter rendered in said state court action the lower court adopted the Special Master's findings that petitioner did not own the property and his recommendation that the debtor's proceedings be dismissed (R. pp. 64, 127). In so doing the lower court was clearly in error aside from the fact that title or ownership is not an issue in such state court actions (105 P. 2nd 615), for the jurisdiction of the state court in such proceedings manifestly ter-

minated with the filing of petitioner's present application for relief.

Upon the filing of the petitioner's application for relief the bankruptcy court was vested with sole and exclusive jurisdiction over the property listed in the schedule and in the possession of petitioner. It has sole and exclusive jurisdiction thereafter to determine in summary proceedings this controversy over ownership. Such jurisdiction manifestly was not exercised by passively submitting to or acquiescing in the asserted conclusive effect of prior state court actions, by abiding the outcome of a pending state court unlawful detainer action or by thereafter foreclosing petitioner from disputing respondent's claim of ownership because of the judgment rendered in said pending state court action.

Subdivision (n) of said Section 75 refers to this jurisdiction of the bankruptcy court in debtor's application as being the same as if a voluntary application for adjudication had been filed and a decree of adjudication entered.

In discussing the extent of such jurisdiction this Honorable Court has thus declared the rule in

> *Gross v. Irving Trust Co.*, 289 U. S. 342, 53 S. Ct. 605, 606, 77 L. ed. 1243, 90 A.L.R. 1215:
>
> "Upon adjudication of bankruptcy, title to all the property of the bankrupt, wherever situated, vests in the trustee as of the date of filing the petition in bankruptcy. The bankruptcy court has *exclusive* jurisdiction, and that court's pos-

session and control of the estate cannot be affected by proceedings in other courts, state or federal. Isaacs v. Hobbs Tie & T. Co., 282 U. S. 734, 737, 51 S. Ct. 270, 75 L. Ed. 645, and cases cited. Such jurisdiction having attached, control of the administration of the estate cannot be surrendered even by the court itself."

To the same effect, *Daly v. Sternberg*, 293 U. S. 470, 70 L. Ed. 599.

In the earlier case of *Isaacs v. Hobbs Tie & T. Co.*, 282 U. S. 734, at page 737, 51 S. Ct. 270, 271, 75 L. Ed. 645, the court said:

"Upon adjudication, title to the bankrupt's property vests in the trustee with actual or constructive possession, and is placed in the custody of the bankruptcy court. Mueller v. Nugent, 184 U. S. 1, 14, 22 S. Ct. 269, 46 L. Ed. 405. The title and right to possession of all property owned and possessed by the bankrupt vests in the trustee as of the date of the filing of the petition in bankruptcy, no matter whether situated within or without the district in which the court sits. Robertson v. Howard, 229 U. S. 254, 259, 260, 33 S. Ct. 854, 57 L. Ed. 1174; Wells & Co. v. Sharp (C. C. A.) 208 F. 393; Galbraith v. Robson-Hilliard Grocery Co. (C. C. A.) 216 F. 842. It follows that the bankruptcy court has exclusive jurisdiction to deal with the property of the bankrupt estate. It may order a sale of real estate lying outside the district. Robertson v. Howard, supra; In re Wilka (D. C.) 131 F. 1004. When this jurisdiction has attached, the court's possession cannot be affected by actions brought

in other courts. White v. Schloerb, 178 U. S. 542, 20 S. Ct. 1007, 44 L. Ed. 1183; Murphy v. John Hofman Co., 211 U. S. 562, 29 S. Ct. 154, 53 L. Ed. 327; Dayton v. Stanard, 241 U. S. 588, 36 S. Ct. 695, 60 L. Ed. 1190."

In *Re Lawman*, 8 F. Supp. 886, the court declared that Congress intended to *stay* all proceedings in state or federal courts affecting one who had filed a petition under said Section 75 of the Bankruptcy Act.

In *Re Cope*, 8 F. Supp. 961, 77 F. 2nd 993 the inhibitions of Section 75 against such state court actions were held to be *self-executing*.

It should be observed that subsection (p) of said Section 75 provides:

> "The prohibitions of subsection (o) shall apply to all judicial and official proceedings in any court or under the direction of any official and shall apply to all creditors public or private and to all the debtor's property wherever situated. All such property shall be under the sole jurisdiction and control of the Court in bankruptcy."

This subsection reaffirms and reemphasizes the exclusive jurisdiction conferred by the preceding subsections upon the bankruptcy court to adjudicate all controversies over title or possession of property scheduled by a petitioning debtor.

The jurisdiction of the bankruptcy court to determine *all cases* and *controversies* between the bankrupt and any creditor is essentially an indisputable and exclusive jurisdiction. Such doctrine is plainly an-

nounced by *Watts v. Sacks*, 190 U. S. 1, 47 L. Ed. 933; *Straton v. Andy New*, 283 U. S. 318, 75 L. Ed. 1060; *Acme Harvester Co. v. Beckman Lumber Co.*, 220 U. S. 300, 56 L. Ed. 208.

In *Acme Harvester Co. v. Beckman Lumber Co.*, supra, the court significantly declared that all property claimed by the bankrupt is in *custodia legis* from the time of the filing of the petition in bankruptcy.

In *Ex parte Baldwin*, 291 U. S. 610, 78 L. ed. 1020, 1023, this court declared:

> "All property in the possession of a bankrupt of which he *claims* the ownership passes upon the filing of a petition in bankruptcy into the custody of a court of bankruptcy. To protect its jurisdiction from interference, the court may issue an injunction. The power is not peculiar to bankruptcy or to federal courts. It is an application of the general principle that where a court of competent jurisdiction has through its offices taken property into its possession, the property is thereby *withdrawn* from the jurisdiction of *other* courts.
>
> "Having possession, the court * * * is entitled to determine all questions respecting the same. Julian v. Central Trust Co., 193 U. S. 93, 112; 48 L. Ed. 629, 639; * * * The jurisdiction in such cases is exclusive of the jurisdiction of other courts, although otherwise the controversy would be cognizable."

To the same effect is the opinion in *Thompson v. Magnolia Petroleum Co.*, 300 U. S. 478, 84 L. Ed. 876-9.

The court there significantly declared:

> "Bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession; and the *test* of jurisdiction is *not title*, but possession by the bankrupt * * * The jurisdiction thus acquired by the bankruptcy court extends to its adjudication respecting *title*."

Petitioner herein was in possession of the property at the time respondent moved for a dismissal of the proceedings.

In *In Re Tray*, 80 F. (2d) 9, the court declared that the purpose of the section is to enable the court to control property *claimed* by the bankrupt until the bankrupt's interest is determined by summary proceedings therein.

It has furthermore been just as plainly declared that such exclusive jurisdiction of the District Court having been invoked and attached it extends to the determination of all questions involved whether resting upon *state* or federal law (*Louisville and Nashville Railroad Co. vs. Greene*, 244 U. S. 522, 61 L. ed. 1291).

In *In Re Koch*, 116 F. (2d) 243, 246, a state court action proceeded to judgment prior to the bankruptcy adjudication. The state court judgment directed the receiver appointed by the state court to take possession of and title to all property derived by the fraud of the defendants therein, including the defendant Koch. The bankruptcy court enjoined the receiver from taking possession of property claimed by the

bankrupt and directed the receiver to return property alleged to have been obtained by said defendant through such fraud. The court stated:

> "Where a bankrupt is in possession of property, the bankruptcy court has jurisdiction to adjudicate in summary proceedings the rights of adverse claimants. (Citing cases) We are satisfied that the District Court had jurisdiction to *determine summarily* whether the *property claimed* by the debtor was hers."

In *In Re Wilkinson,* 10 F. Supp. 100, it is to be observed that the court held that a chattel mortgagee's right to possession of the property could properly be adjudicated only *after* the *conciliation commissioner* had in the regular course of the proceedings under Section 75 made his report and that such adjudication could *not* be made upon a *motion* to *dismiss* the debtor's petition for relief.

Nevertheless, in this instance, as heretofore observed, the special master upon the hearing of respondent's motion to dismiss the petition of petitioner for relief, presumed to find that the respondent was entitled to the possession of the property and that the debtor was estopped to dispute such right to possession, the validity of the foreclosure sale or the important question of ownership by certain state court proceedings, *one* of which was *pending* when respondent's motion to dismiss was referred to him by the bankruptcy court. The lower court held likewise and directed judgment accordingly.

In *Re O'Brien* (1935; C. C. A. 2d) 78 F. (2d) 715 (affirming (1935; D. C.) 9 F. Supp. 892, 27 Am. Bankr. Rep. (N. S.) 376), it was held that, after the filing of a petition by a farmer-debtor under Section 75, the docketing of a judgment obtained subsequent thereto, in an action pending when the petition was filed which by state law constituted a lien on the property in question and prevented the carrying out of a composition, violated the theory, purpose, and express provisions of subsections (e), (n), and (o) of the section, which contemplate immunity of all property under the jurisdiction of a bankruptcy court from proceedings in state courts, and that consequently the creditor should be ordered to *discharge* or otherwise release the state court judgment as a *cloud* upon title.

In the light of the foregoing decisions and the plain provisions of said Section 75, therefore, it seems incontrovertible that the state court was with jurisdiction to proceed with the last unlawful detainer action after the filing of petitioner's application for relief under said section. If so, the conclusions of the Special Master and the judgment of the District Court were clearly erroneous in determining that by reason of the judgment in said unlawful detainer action petitioner was estopped to question respondent's claim of ownership. Likewise, the decision of the Circuit Court affirming said judgment, findings and procedure of the Special Master and District Court, is in conflict with the foregoing section of the Bankruptcy Act and the decisions referred to.

III.

PETITIONER WAS NOT ESTOPPED BY THE JUDGMENT IN ITS PREVIOUS PROCEEDINGS UNDER SAID SECTION 75 TO DISPUTE RESPONDENT'S PRESENT CLAIM OF OWNERSHIP.

It would be repetitious of what has heretofore been discussed were petitioner to elaborate on its contention that neither the Special Master nor the District Court was controlled upon petitioner's present application for relief by any former proceedings commenced by petitioner for relief under said section of the Bankruptcy Act. In this regard it should suffice to say that the decisions heretofore referred to extend no authority to either a Special Master or a bankruptcy court to arbitrarily conclude upon a motion to dismiss such an application that the rights of an applicant for relief under said section have been foreclosed by his previous proceedings under said Section 75.

Whether or not there was such a valid prior adjudication of this question of ownership in the former proceedings was and it is at least a matter of substantial controversy. In any event this petitioner claimed to be the owner of such property. Petitioner was in possession, and as already pointed out, this court and other Federal Courts have repeatedly determined that in such instance the Bankruptcy Court is not controlled by actions in either State or Federal Courts. Instead such Bankruptcy Court must properly exercise its jurisdiction by determining such claim of ownership in summary proceedings after full inquiry and hearing before the conciliation commissioner. We

therefore discuss the effect of the judgment in the former procedures but briefly as its effect is beside the point here involved.

The decision of the Circuit Court of Appeals in the former proceedings of the applicant for relief is set forth in 94 Fed. (2d) 491. The decision of that court is predicated solely upon the fact that at that particular time petitioner lacked corporate capacity and therefore the bankruptcy court was without jurisdiction. The Circuit Court of Appeals in that decision did significantly point out the fact that the property purported to have been sold at the foreclosure sale by one *not authorized* to conduct such sale.

But aside from this fact, it seems obvious that the District Court in the former proceedings, having determined that it was without jurisdiction by reason of the corporate incapacity of petitioner, it lacked jurisdiction thereafter to determine any other fact asserted by either petitioner or respondent therein. If petitioner at that time lacked corporate capacity, it could not engage in farming operations and therefore was entitled to no relief and the court was without jurisdiction to entertain such proceedings. (*Davis v. Shackleford,* 91 Fed. (2d) 148-150; same effect, *In re Weiss,* 10 Fed. Supp. 227-229; *In re Peterson,* 8 Fed. Supp. 86).

Where, in the course of a bankruptcy proceeding, it is made to appear that there is an end of jurisdiction, the court should proceed no further except to dismiss the proceedings for want of jurisdiction. (*Finn v. Carolina, etc. Co.,* 232 Fed. (C.C.A.) 815, 818; see also *In re Palma Bros.,* 8 Fed. Supp. 920)

Where the court is wholly without jurisdiction to try a particular title or right, its judgment or decree is not of course conclusive as to such title or right (34 Corp. Jur. p. 955).

> "No conclusive effect can be given to a judgment which is absolutely void whether the invalidity results from want of jurisdiction of the parties or over the subject matter of the controversy or from want of authority in the court. * * *"
>
> 34 *Corp. Jur.* pp. 899, 900.

A judgment void for want of jurisdiction is open to contradiction or impeachment in a collateral proceeding. The defect of jurisdiction may be wanting in respect to the person, the subject matter or the authority to render the particular judgment or decree. (34 *Corp. Jur.* pp. 528, 531).

> "A judgment rendered by a court having no jurisdiction is a *mere nullity* and will be so held and treated whenever and for what purpose it is sought to be used and relied on as a valid judgment."
>
> 33 *Corp. Jur.* 1073.

> "Where a judgment is void for want of jurisdiction whether of the subject matter or of the person of the defendant, it is of *no* effect whatever as an *estoppel* * * *"
>
> 34 *Corp. Jur.* p. 768, citing
>
> *Jasper Bank v. Rome First Nat. Bank*, 258 U. S. 112, 66 L. Ed. 490, and other cases.

"A judgment dismissing a suit on account of any technical defect, irregularity or informality is not on the merits and is therefore no bar to a subsequent action."

34 *Corp. Jur.* p 793.

"* * * The same rule applies to a dismissal on the sole ground that plaintiff has not sufficient title or authority to bring the suit or for want of capacity to sue on his part."

34 *Corp. Jur.* 793.

"A dismissal of an action on the sole ground that the court has no jurisdiction of the subject matter of the suit or of the parties is no adjudication of the merits and will not bar another action for the same cause."

34 *Corp. Jur.* 795, citing
S. P. Co. vs. Vegort, 250 U. S. 483, 39 Supreme Court 533, 63 L. Ed. 1099, and other cases.

Further citation of authorities on the foregoing rules would be merely cumulative. Suffice it to say that the District Court in the previous proceedings of petitioner as a debtor having found that it had no jurisdiction to entertain the proceedings by reason of corporate incapacity, such court was without jurisdiction to make any determination upon this question of ownership of the property. In so far as the judgment in the former proceedings purported to make such finding upon the issue of ownership, it is submitted that said judgment was void upon its face.

We repeat that the Circuit Court of Appeals in that proceedings expressly refrained from approving the

judgment of the District Court upon this issue of ownership (94 Fed. 2d 493).

The foregoing discussion seems ample to indicate that at the time of the petitioner's present application for relief substantial question at least existed as to the validity of respondent's claim of ownership. The fact that there was such controversy and the fact that petitioner was in possession of the property at the time it filed its present application for relief made it mandatory for the bankruptcy court to comply with the rule as to its exclusive jurisdiction set forth in the decisions quoted herein and to require that such controversy should be determined in summary proceedings after a hearing before the Conciliation Commissioner.

The lower court, as well as the Special Master, instead disregarded the established mode and procedure for determining such controversy and arbitrarily and erroneously concluded that petitioner was estopped to dispute respondent's claim of ownership by reason of the District Court judgment in the former proceedings of petitioner under said Section 75 (R. pp. 64, 128). While the decision of the Circuit Court of Appeals held at least inferentially that such debtor *may* establish ownership it wholly failed to recognize the fact that no opportunity was given to said debtor to establish such ownership because of the lower court's refusal to exercise its jurisdiction as prescribed by statute and overwhelming judicial precedent.

IV.

THE STIPULATION ENTERED INTO BY FORMER COUNSEL FOR PETITIONER AND COUNSEL FOR RESPONDENT TO ABIDE THE OUTCOME OF THE LAST STATE COURT UNLAWFUL DETAINER ACTION AND TO BE GOVERNED THEREBY, WAS UNLAWFUL, IMPROVIDENT AND INEFFECTIVE. THE SPECIAL MASTER ERRONEOUSLY ACCEPTED SAID STIPULATION AND BASED HIS RECOMMENDATION OF DISMISSAL OF PETITIONER'S APPLICATION UPON SAME AND THE JUDGMENT RENDERED IN SAID STATE ACTION. THE DISTRICT COURT ERRONEOUSLY REFUSED TO RELIEVE PETITIONER FROM SUCH STIPULATION.

As heretofore pointed out, the state court in the last unlawful detainer action was permitted to proceed to the completion of said action by stipulation of former counsel for petitioner and counsel for respondent (R. p. 68). This improvident stipulation stipulated that petitioner's application for relief and the bank's motion to dismiss should be governed by the outcome of the decision in that state court action, an action which, it should be emphasized, did not involve a determination of any issue of title (105 Pac. 2d. 615).

Immediately upon the rendition of the decision in that action, the Special Master filed his findings and report with the lower court recommending the dismissal of petitioner's present application for relief. The recommendation of the Special Master was predicated to great extent upon the effect of such stipulation and the judgment in said unlawful detainer action (tr. pp. 61, 64, 65). The lower court

accepted that recommendation and directed judgment accordingly. This was clearly an unprecedented and unjustified procedure, if Section 75 and the decisions heretofore referred to have any significance.

Assumably the issue of title or ownership in the minds of the signers of such stipulation, if not in the mind of the Special Master, remained in substantial dispute at the time such stipulation was executed. The stipulation manifestly had no other purpose than to resolve that dispute by a short cut to the pending state action. If it be assumed that the Special Master was in good faith attempting to determine the validity of respondent's assertion that it owned the property listed by petitioner in its schedules, then the Master contemplated that that issue of ownership would be decided by the forthcoming state court decision.

To summarize, the Special Master attempted to determine that important issue of title by accepting a stipulation directed to the outcome of a state court action which could not decide the very issue he, the Special Master, was at that time meditating (105 Pac. 2d 615).

Of course the error of the foregoing process of the Special Master becomes undeniably obvious in the light of the decisions heretofore referred to. The foregoing discussion seems ample to indicate to this court that the stipulation presuming to terminate petitioner's proceedings for relief upon the basis of the last state court detainer action was indeed improvident, wholly unwarranted, and void ab initio. The lower court should promptly have granted peti-

tioner's request to be relieved therefrom. Instead, said court erroneously denied said motion of petitioner and affirmed the findings and recommendation of the Special Master upon authority of said stipulation, as well as the outcome or judgment in said last state court unlawful detainer action.

V.

THE DEFICIENCY JUDGMENT AND THE ACTION TO RENEW THE SAME CREATED NO ESTOPPEL AS AGAINST PETITIONER IN REGARD TO THE FACT OF THE OWNERSHIP OF THIS PROPERTY.

Such actions are referred to with contrary effect in the Special Master's findings (R. pp. 56, 57, 61).

In view of the fact that this question is also one which should properly have been determined only after a hearing before the Conciliation Commissioner and by summary proceedings instituted under the direction of the lower court, our discussion of the foregoing contention will be limited.

The deficiency action was brought on a common count for an alleged balance due upon a promissory note. All of the allegations of the complaint were denied by petitioner. Neither the pleadings nor the judgment in the deficiency action indicate that it involved petitioner's farming property or that the note referred to was secured by a deed of trust executed by petitioner. The foregoing facts respondent will concede. Only by imagination or conjecture might

it be concluded that this was an action for deficiency judgment or that the validity of the foreclosure sale was an issue.

In

Blumenthal v. Maryland Cas. Co., 119 Cal. App. 566, 6 Pac. 965,

it is stated:

"*But if upon the face of the record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel.*" (Italics ours.)

In

Lillis v. Emigrant Ditch Co., 95 Cal. 553, 559-560, the court states:

"In any other action between the same parties upon a different demand; though involving facts which were litigated in the former action, such judgment is conclusive only as to the same matters *in issue* which were determined in the former action, and which were also essential to the rendition of the judgment. * * * The matter adjudicated, to become as a plea, a bar, or as evidence conclusive, *must have been directly in issue*, and not merely collateral litigated. * * * It must be a fact immediately found *according to the pleadings*, not that on which the verdict was immediately based—a fact in issue as distinct from a fact in controversy. * * * *A fact or matter in issue is that upon which the plaintiff proceeds by his action, and which the defendant controverts in his pleadings; while collateral facts are such as are offered in evidence to establish the matters or*

facts in issue; and notwithstanding they may be controverted at the trial, they do not come within the rule." (Italics ours.)

Lillis v. Emigrant Ditch Co., 95 Cal. 553, 559-560; 30 Pac. 1108.

In the deficiency case, the declaration was upon a promissory note, no copy of which was set forth, it being pleaded according to its legal effect. Upon that note it was alleged that a certain sum remained unpaid. There was nothing in the complaint indicating in any way that the note had been secured, by deed of trust or otherwise.

The execution of the note was admitted by appellant's answer. Non-payment was denied for want of information and belief—as a matter of law, non-payment was admitted. There was no special defense, alleging that the note had been secured by deed of trust and that the deed of trust had not been foreclosed.

Therefore there was no issue of fact as to whether the note had been secured, nor any as to whether the security had been foreclosed by sale under a deed of trust.

The regularity of the foreclosure sale was therefore not an "issue" in the deficiency case. Not having been made an issue, it could not be litigated. Even had there been a finding that such a sale had been made (which there was not), that finding would have been outside the issues, void and of no effect for any purpose.

"It is contemplated by our law that findings of fact shall be made only upon issues joined in the pleadings."

Waller v. Weston, 125 Cal. 201, 204; 57 Pac. 892;

Perkins v. Perkins, 29 Cal. App. 68, 70; 54 Pac. 483.

The foregoing argument applies as well to the action filed in the State court to renew the alleged deficiency judgment.

The conclusion of the Special Master and the District Court that the validity of the foreclosure sale or the issue of ownership had been decided by the judgment in the deficiency action, as well as in the action to renew same, we believe, was wholly erroneous. But whether it was or not the question at least was seriously disputable and was one that could only be properly and legally resolved and disposed of with the other questions presented in summary proceedings, and after hearing of petitioner's application upon the merit before the Conciliation Commissioner.

VI.

AN APPLICANT FOR RELIEF UNDER SECTION 75 OF THE BANKRUPTCY ACT IS NOT REQUIRED TO BE THE OWNER OF FARMING PROPERTY. IN ANY EVENT SUCH APPLICANT SHOULD NOT BE FORECLOSED FROM ESTABLISHING THAT HE IS SUCH OWNER.

Aside from the fact that petitioner had no opportunity to establish the fact there is no requirement in

the statute that an applicant for relief under Section 75 of the Bankruptcy Act must be the owner of farming property. Subdivision (c) of Section 75 identifies the particular person entitled to relief thereunder. It provides:

> "At any time within five years * * * a petition may be filed by *any* farmer * * *"

Subdivision (r) of that section defines a farmer as including:

> "not only an individual who is primarily bona fide engaged in producing products of the soil, but also any individual who is primarily bona fide personally engaged in dairy farming."

The beneficent purpose of this act of Congress denies any construction that would limit its application to farmers who are the owners of land.

An applicant for relief under this section of the Bankruptcy Act may be an owner of land or he may be a tenant of land. He may be operating under a cropper's contract or he may be one who is engaged in producing products of the soil upon land in which he has no interest whatsoever.

Such, we submit, is the only effective interpretation to be given to this particular statute.

As we understand the decision of the Circuit Court of Appeals, it is to the effect that petitioner was not a farming corporation because it had not established that it was the owner of this property—and this despite the fact that by the erroneous conclusions

of the Special Master and the lower court, as to the absolute effect of state decisions and the former proceedings of the debtor, petitioner was prevented from establishing that very fact of ownership.

If this is the proper effect to be given to the decision of the Circuit Court in this matter, and if a petitioning debtor must own the farming property, then it is submitted that said decision is also in conflict with the statute and the decisions heretofore referred to by denying to petitioner full opportunity to supply in summary proceedings, such required proof of ownership.

CONCLUSION

The foregoing authorities seem demonstrative upon these propositions. The judgment of the lower court in directing the dismissal of the petitioner's application upon the basis of the stipulation of counsel and upon the ground that the debtor was foreclosed by state court actions and the former proceedings under Section 75 from disputing the claimed title of appellee was wholly erroneous. Said District Court should promptly have relieved petitioner from the effect of the unlawful and improvident stipulation entered into by its former counsel. Said court should then as promptly denied respondent's motion to dismiss and then assumed the paramount and exclusive jurisdiction and control over the property claimed by the debtor in accordance with the plain requirements of said Section 75. Thereafter the same court should

have fully discharged its duty by determining in summary proceedings the disputed question of ownership in accordance with the facts as well as the law.

For the foregoing reasons it is respectfully submitted that the writ of certiorari should issue as prayed for herein.

Respectfully submitted,

GEORGE THOMAS DAVIS,

Counsel for Petitioner.

In the Supreme Court

OF THE

United States

Office - Supreme Court, U. S.
FILED
DEC 22 1941
CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1941

No. 777

MCLAUGHLIN LAND AND LIVESTOCK COMPANY (a corporation),

Petitioner,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION (a corporation),

Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF IN OPPOSITION FOR THE RESPONDENT BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION.

HERBERT W. ERSKINE,
625 Market Street, San Francisco, California,
Attorney for Respondent.

MORSE ERSKINE,
J. BENTON TULLEY,
KEYES & ERSKINE,
625 Market Street, San Francisco, California,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

Page

Opinions Below 1

Statement of the Case 2

Statement of the Facts 4

Argument 12

A. There is no reason for granting a writ of certiorari .. 12

B. The concurrent decisions of the courts below were correct 13

I.

There was no showing that petitioner was a farming corporation or actually and bona fide engaged in farming practices within the meaning of Section 75 of the Bankruptcy Act 14

II.

Petitioner was not a farmer inasmuch as it did not own and was not lawfully possessed of any farming property 16

A. Both the deficiency judgment and the judgment renewing the deficiency judgment constitute a conclusive estoppel as against petitioner in its attempt to again litigate the validity of the foreclosure sale 18

B. The judgment of dismissal in the former proceedings filed by petitioner under Section 75 of the Bankruptcy Act constitutes a conclusive estoppel against petitioner in its attempt to again attack the validity of the foreclosure sale 19

C. The foreclosure sale was not conducted by an unauthorized person and was valid in all respects 24

D. The judgment in the last unlawful detainer action constitutes a conclusive estoppel against petitioner's present attempt to attack the validity of the foreclosure sale 26

E. The judgment in the quiet title action filed by the petitioner is conclusive of all issues raised by it in this proceeding 28

III.

Page

The stipulation signed by counsel for all parties agreeing that the decision in the last unlawful detainer case and in the Kirkpatrick action should be conclusive upon the parties was proper and did not transcend the powers of the court 28

IV.

Petitioner was guilty of laches, and any claim that it has to the property is barred by the statute of limitations.... 30

V.

Conclusion 31

Table of Authorities Cited

Cases

	Pages
Baldwin, Ex parte, 291 U. S. 610, 54 S. Ct. 551	29
Bank v. McLaughlin, 22 Cal. App. (2d) 411, 71 P. (2d) 291, 72 P. (2d) 554	6
Bank of America v. McLaughlin, 37 Cal. App. (2d) 415, 99 P. (2d) 548	5
Bank of America v. McLaughlin Land & Livestock Co., 40 Cal. App. (2d) 620, 105 P. (2d) 607	5, 8, 9, 12, 18, 19, 25, 27
Bastian v. Erickson, C. C. A. 10, 114 F. (2d) 338	22
Bertschmann v. Covell, 205 Cal. 707	26
Boehme, In re, D. C. Mont., 41 Fed. Supp. 426	12, 22
Buttars v. Utah Mortgage Loan Corp. (C. C. A. 10), 116 F. (2d) 622	25
Chicot County Drainage Dist. v. Baxter State Bank, 308 U. S. 371, 60 S. Ct. 317, 84 L. Ed. 329	25
Chrisman, In re, D. C. Cal., 35 Fed. Supp. 282	22
Harris v. Seidell, 1 Cal. App. (2d) 410	26
Kirkpatrick v. McLaughlin etc. Co., 41 Cal. App. (2d) 954, 107 P. (2d) 99	9, 19
Knauff, In re, D. C. Cal., 10 Fed. Supp. 786	22
Kraemer v. Coward, 2 Cal. App. (2d) 506	26
McLaughlin v. Bank of America, 61 S. Ct. 958	5
McLaughlin v. Bank, 94 Fed. (2d) 491	8
Orloff v. Pece, 134 Cal. App. 434	26
People v. Skidmore, 27 Cal. 287	23
Randall, In re, D. C. Penn., 20 Fed. Supp. 470	22
Russell v. Russell, C. C. A. 3, 134 Fed. 840, cert. denied 198 U. S. 584, 49 L. Ed. 1173, 25 S. Ct. 802	23
Societa Italiana Di Mutua Beneficenza v. Burr (C. C. A. 9), 71 F. (2d) 496	20
State v. City of Cleveland, 60 O. App. 295, 22 N. E. (2d) 223	23
Stoll v. Gottlieb, 305 U. S. 165, 59 S. Ct. 134, 83 L. Ed. 104	25

Pages

Thompson v. Magnolia Petroleum Co., 309 U. S. 478, 60 S. Ct. 628 29

Union Joint Stock Land Bank v. Byerly, 310 U. S. 1, 60 S. Ct. 773, 84 L. Ed. 1041 ..... 21, 25

Weis, In re, D. C. Iowa, 10 Fed. Supp. 227 22

Wright v. Union Central Life Insurance Co., 304 U. S. 502, 58 S. Ct. 1025 20

Codes and Statutes

Bankruptcy Act, Section 75 ..... 6, 9, 10, 15, 16, 17, 19, 24, 30

15 C. J. 851, Sec. 170 12

34 C. J. 773 23

21 C. J. S., Sec. 113 12

Civil Code, Sec. 2307 26

Code of Civil Procedure:

Section 338, subd. 4 7

Section 1161 (1) 6

Section 1161a 5

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1941

No. 777

McLAUGHLIN LAND AND LIVESTOCK COMPANY (a corporation),

Petitioner,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION (a corporation),

Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF IN OPPOSITION FOR THE RESPONDENT BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION.

OPINIONS BELOW.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit (R. 206-208) is reported in 122 Fed. (2d) 193.

The judgment and decree of dismissal of the United States District Court for the Northern District of California is in the record at page 126.

STATEMENT OF THE CASE.

Petitioner's complaint is that it was precluded by the court below in showing that it was the owner of approximately 7000 acres of real property listed in its schedules. This is a misstatment of the facts, as will presently appear. This complaint is predicated upon the fact that petitioner was in the possession of the real property and therefore the Bankruptcy Court had summary jurisdiction to determine title, which it failed to do. This is another misstatement of the facts. 6640 acres of land are described in the schedules, and the fact is that the petitioner voluntarily surrendered all but 600 acres of the land to respondent, hereinafter for convenience called Bank, immediately after a foreclosure sale which was held on March 28, 1932, and, in fact, disclaimed any interest to said land in a suit subsequently commenced by Bank. Petitioner did not possess any of the 600 acres after the foreclosure until December 1, 1938, which was after the termination of an oral seven-year lease given to the stockholders and officers of petitioner by the Bank. On the last mentioned date petitioner took possession of the 600 acres from its stockholders, directors and officers for the sole purpose of re-litigating the question of the validity of the foreclosure sale which was held more than seven years previous thereto.

Throughout its petition for certiorari and in the brief in support thereof, petitioner claims that the court below should have determined the issue of title to the 6640 acres of property listed in its schedules, inasmuch as title was not involved in and had

not been decided in any other case. This is another gross misstatement of the facts and is contrary to its pleading in the court below (R. 40). Too, the fact is that the court below did decide the question of title. It held that petitioner had no interest in the property and in fact was trespassing thereon. Petitioner's only semblance of a claim to the property is that the foreclosure proceedings leading up to the foreclosure sale which was held on March 28, 1932, were defective in certain particulars (R. 37-38). That issue—whether the foreclosure proceedings were regular in all respects and the foreclosure sale actually held—has been determined in four separate proceedings, all of which were decided before this proceeding was instituted. One of those four proceedings directly involved the question of title, being a direct attempt by petitioner to quiet its title to the property by way of a cross-complaint, and in a fifth proceeding petitioner commenced an action against Bank seeking to quiet title to the property.

Petitioner's sole complaint before the District Court was that no hearing was held before the Special Master and that the recommendation of the dismissal was made solely upon the stipulation entered into by counsel for petitioner, counsel for Bank, and counsel for certain unsecured creditors, wherein the parties stipulated that the Bank's petition should abide the appeals taken by the petitioner from two judgments rendered against it in the State Court.

This contention was completely devoid of merit, inasmuch as there had been a full hearing before the

Special Master, and petitioner had actually introduced evidence in opposition to the petition filed by the Bank. Consequently, petitioner has abandoned this contention in its petition for certiorari.

After the District Court had dismissed these proceedings, petitioner filed an action to quiet title to the property in the State Court. Judgment was rendered in favor of the Bank, which judgment has become final. A certified copy of the judgment roll in this latter action was filed with the Circuit Court.

We feel that a brief chronological history of the facts and litigation will be helpful to the court.

STATEMENT OF THE FACTS.

On March 17, 1931, the petitioner and one William Brinan made, executed and delivered a promissory note to the Bank in the sum of $173,800.00, and as security for said note petitioner conveyed 6640 acres of land to Corporation of America, as trustee for Bank. Petitioner defaulted under the note, and the property was foreclosed on March 28, 1932. A trustee's deed was thereupon executed, delivered and recorded (R. 54, 55).

Immediately following the sale, *petitioner surrendered possession of all but 600 acres of the property to the Bank, and the Bank has paid all taxes on the land since the foreclosure sale* (R. 47, 186-187, 189). The stockholders of appellant remained in possession of the remaining 600 acres for over seven years by virtue of an oral seven-year lease (*Bank of America*

v. McLaughlin Land & Livestock Co., 40 Cal. App. (2d) 620, 105 P. (2d) 607; *Bank of America v. McLaughlin,* 37 Cal. App. (2d) 415, 99 P. (2d) 548).

Ever since 1932 the Bank has been attempting to obtain possession of the remaining 600-acre parcel, and, as petitioner so aptly states, a considerable amount of litigation has ensued. The following is a brief statement of that litigation.

On May 27, 1932, the Bank commenced an action in unlawful detainer under the provisions of section 1161a of the Code of Civil Procedure of the State of California, which provides for the remedy after foreclosure under a mortgage or deed of trust, and sought possession of the entire 6640 acres covered by the deed of trust. The petitioner, in its answer in that case, *admitted the regularity of the foreclosure proceedings and the validity of the foreclosure sale* (R. 55-56; 189; *Bank of America v. McLaughlin Land & Livestock Co.,* 40 Cal. App. (2d) 620, 105 P. (2d) 607) *and disclaimed as to all but 600 acres* (R. 189). It set up as an affirmative defense that the Bank had given it and its stockholders and officers, members of the McLaughlin family, an oral seven-year lease to 600 acres of the property. *No claim was made as to the remaining 6040 acres of property* (R. 186-187, 189). The jury found for petitioner in that case and judgment was entered accordingly.

In April, 1933, H. H. Bechtel, as assignee of the Bank, brought an action for the balance due on the note for $173,800.00, which was originally secured by the deed of trust. The petitioner answered and

pleaded payment. The case was tried on November 13, 1933, petitioner being represented in court by counsel and its president (R. 191-192). On November 20, 1933, findings of fact and conclusions of law were made by the court, and a deficiency judgment was entered in favor of Bechtel. That judgment has become final (R. 56-57).

On July 11, 1933, the Bank commenced a second unlawful detainer action, under the provisions of section 1161 (1) C. C. P. This action involved only the 600-acre parcel claimed by the petitioner and its stockholders as lessees in the original unlawful detainer action and was prosecuted on the theory that the tenancy of the appellant and its stockholders had terminated. In that case, *petitioner denied that it was in possession of any part of the property and claimed that the oral seven-year lease was made between the Bank and petitioner's stockholders as individuals.* In other words, petitioner, contrary to its verified answer in the first unlawful detainer action, pleaded that it was not a party to that lease. The answer filed by the defendants in the second unlawful detainer action further pleaded that the judgment in the first unlawful detainer action was *res judicata* (R. 57-58), which defense was ultimately affirmed by the State Court (*Bank v. McLaughlin*, 22 Cal. App. (2d) 411, 71 Pac. (2d) 291, 72 Pac. (2d) 554).

During the pendency of the last case petitioner filed a petition under section 75 of the Bankruptcy Act. In its original schedules *petitioner listed no real estate* and claimed it was a lessee of certain of the real property involved herein (R. 187-188). Note

that at this point petitioner had reverted to the claim in the first unlawful detainer case that it was a party to the lease. It was not until it filed its second amended schedules that petitioner for the first time listed as an asset all the real property originally covered by the deed of trust. The Bank filed a motion to dismiss those proceedings on the grounds that (1) the petitioner was not a farmer; (2) that the Bank was the owner of the real property listed in the second amended schedules by virtue of the trustee's sale; (3) that the petitioner was estopped from attacking the validity of the foreclosure proceedings by virtue of (a) its laches, (b) the judgment in the deficiency action being *res judicata,* (c) section 338, subd. 4 C. C. P., and on other grounds not here material. The petitioner answered and pleaded that the first unlawful detainer case was *res judicata;* that no trustee's sale was actually conducted; and that the person actually conducting the sale was not authorized to do so (R. 58-59).

The petition to dismiss was referred to a special master for hearing and report, which special master conducted a protracted hearing on the issues raised and found each of the contentions of the Bank set forth hereinabove to be true and decided all matters pleaded in the answer of the petitioner, hereinabove set forth, against it; in other words, the special master found that the Bank was the owner of all the property described in the deed of trust and that the foreclosure proceedings were regular and that the trustee's sale had actually been conducted (R. 59-60).

The District Court approved the report of the special master and dismissed the proceedings on October 22, 1936. The judgment dismissing the bankruptcy proceedings was affirmed by the Circuit Court of Appeals on the sole ground that the petitioner was not a farmer because it was not engaged in farming in fact and also was precluded from doing so because of the forfeiture of its corporate franchise (*McLaughlin v. Bank*, 94 Fed. (2d) 491).

The Bank then waited until the expiration of the seven-year lease and commenced a new action in unlawful detainer against the individual lessees, the stockholders and officers of petitioner, on the ground that they were holding over after the expiration of their lease. The defendants denied possession and affirmatively alleged that they had surrendered possession of the 600-acre parcel to the petitioner on December 1, 1938, which was the day following the expiration of the seven-year lease (*Bank of America v. McLaughlin*, 40 Cal. App. (2d) 620, 105 Pac. (2d) 607).

The Bank then commenced an action in unlawful detainer against petitioner, in which action the petitioner sought to attack the regularity of the foreclosure proceedings and the validity of the foreclosure sale on various grounds, all of which it sought to re-litigate in the court below (R. 113-123). At the trial the Bank introduced in evidence the deed of trust and trustee's deed to prove a *prima facie* case. It also introduced the judgment rolls and transcripts in two previous cases wherein the regularity of the foreclosure proceedings and the validity of the fore-

closure sale were in issue and passed upon, to-wit, the judgment rolls and transcripts in the deficiency action and the previous bankruptcy proceedings filed by petitioner. All evidence offered by petitioner seeking to attack the foreclosure sale was excluded by the state court. No other evidence was offered by the petitioner. A directed verdict was rendered in favor of the Bank, and judgment was accordingly entered on March 28, 1939 (R. 110-112). This judgment was affirmed on September 16, 1940 (*Bank v. McLaughlin*, 40 Cal. App. (2d) 620, 105 Pac. (2d) 607). Petitioner applied for certiorari, making substantially the same contention as it makes in its present application, which was denied on May 5, 1941 (*McLaughlin v. Bank of America*, 61 S. Ct. 958).

During the pendency of the last action, W. J. Kirkpatrick, an assignee of the bank, filed suit to renew the deficiency judgment. On March 22, 1939, the petitioner filed an answer and cross-complaint *seeking to set aside the foreclosure sale* and deficiency judgment (R. 29, 39, 185-186). The Bank filed a demurrer to the cross-complaint, which demurrer was sustained without leave to amend, and judgment was thereupon entered (R. 39, 61-62). The petitioner took an appeal and stipulated that in the event the District Court of Appeal affirmed the last unlawful detainer action, the appeal should be dismissed. Upon affirmance of the last unlawful detainer action, the appeal was dismissed (*Kirkpatrick v. M. Laughlin etc. Co.*, 41 Cal. App. (2d) 954, 107 P. (2d) 99).

After this proceeding under section 75 of the Bankruptcy Act had been dismissed by the Federal District

Court, the petitioner commenced an action to quiet title to all the property covered by the deed of trust and for declaratory relief. That case was tried on April 22, 1941, and judgment was subsequently entered in favor of the Bank on May 6, 1941. A certified copy of the judgment roll in that case was filed with the Circuit Court. That judgment has become final.

The only contention made by the petitioner is that the foreclosure sale was not validly held. This contention, as petitioner concedes, has been made by it time and time again, and on each occasion the contention has been determined against it. The same contention advanced here was involved in and adjudicated (1) in the deficiency action, (2) in the former proceeding filed by the appellant under section 75 of the Bankruptcy Act, (3) in the last unlawful detainer case, (4) in the action to renew the deficiency judgment, (5) in the action to quiet title and for declaratory relief filed by it after the dismissal of this proceeding by the court below, and (6) by the court below.

There must be an end to litigation. Clearly, petitioner has had its day in court on many, many occasions

Petitioner claims that the Circuit Court erred in affirming the judgment of dismissal on the ground that it had not established that it was a farming corporation or bona fide engaged in farming, in view of the fact that it was precluded from making such a showing by the special master. This contention is erroneous on two scores. First of all, it was not precluded from making any such showing. The record clearly

shows that the petitioner introduced certain evidence into the record and made no attempt to introduce any other evidence. The special master did not fail to admit any evidence which petitioner offered. The Bank introduced evidence to show that it was the owner of the property and that petitioner was trespassing thereon, and the special master so found, which findings were adopted and approved by the Distric Court. Petitioner offered certain evidence in rebuttal and rather than submit to the decision of the special master on the question of whether or not petitioner had any interest in the property, elected to be bound by the appeals taken by it from the two state court judgments, which were then pending on appeal. It offered no evidence to show that it was a farming corporation within the meaning of the act. It offered no evidence to show that it was actually bona fide engaged in farming practice. Surely this did not amount to depriving petitioner of a hearing, as it contends in its petition for certiorari. Petitioner elected to agree to the granting of one of the alternative prayers in the Bank's petition, that is, that the Bank be permitted to proceed with the prosecution of the state court actions to final judgment. This was not only the proper but the only sensible solution of the matter then pending before the special master. Secondly, the statement is erroneous inasmuch as it misconstrues the opinion of the Circuit Court. The opinion of the Circuit Court did not affirm the judgment of dismissal on the ground that petitioner had failed to show that it was the owner of the farming property. The opinion of the Circuit Court was based upon the ground that the

petitioner had failed to show that it was a farming corporation within the meaning of the act and that it was actually bona fide engaged in farming practice within the meaning of the act. *Petitioner does not even discuss this point in its petition for certiorari.*

In any event, the Bank had established a case in favor of its petition to dismiss. The question of whether or not petitioner could attack the validity of the foreclosure sale must be determined by the state law. The law of the State of California clearly precludes such an attack (*Bank of America v. McLaughlin,* 40 Cal. App. (2d) 620, 105 Pac. (2d) 607).

Petitioner also contends that the court below did not have jurisdiction to pass upon the questions presented by the bank's petition until there had been a hearing before the Conciliation Commissioner and report to the District Court. The answer to this contention is clear. Questions relating to the jurisdiction of the court may be raised at any time. (*In re Boehme,* D. C. Mont., 1941, 41 Fed. Supp. 426; 15 *C. J.* 851, Sec. 170; 21 *C. J. S.* Sec. 113.)

ARGUMENT.

A. There is no Reason for Granting a Writ of Certiorari.

The petition for certiorari is requested on the ground that the Circuit Court held that petitioner was not a farming corporation or a farmer because it was not the owner of the property described in its schedules and that inasmuch as the special master had prevented it from proving that it owned the property,

certiorari should issue from this court. That is pure window dressing. The Circuit Court rendered no such opinion. The Circuit Court held that the burden was upon petitioner to show the jurisdictional facts—that it was a farming corporation and bona fide engaged in farming and that in view of the fact that it did not so prove or even attempt to prove before the special master the Bankruptcy Court acquired no jurisdiction over it or its property. The true decision of the Circuit Court is not attacked by petitioner.

Surely it is not the province of this court to pass upon academic questions. This is exactly what petitioner requests the court to do.

B. The Concurrent Decisions of the Courts Below Were Correct.

In order to sustain the contentions of petitioner it would be necessary that the Federal Court sit in review of the courts of last resort of the State of California as to questions of property law of that state. Petitioner's complaint is that the proceedings leading up to a foreclosure sale held in 1932 were irregular in certain respects. The state courts in four separate actions have determined that the foreclosure proceedings were regular in all respects and the sale validly held. The state courts have also held that petitioner is estopped from contending otherwise. The Federal Court in California has twice affirmed these rulings. The sole question presented is whether this issue should be litigated anew.

As we have pointed out, the petition for certiorari filed by the debtor presents an anomalous situation. It

attacks the opinion of the Circuit Court of Appeals, but in doing so builds a straw man. Its complaint is based solely upon the ground that the Circuit Court affirmed the judgment of dismissal on the ground that the petitioner had not shown that it was a farming corporation and a farmer within the meaning of the act, notwithstanding the fact that it was precluded from making such a showing by the special master. The Circuit Court made no such ruling, and the special master did not preclude petitioner from making any showing that it desired to make. The Circuit Court held that there was an entire absence of any showing that petitioner was a farming corporation within the meaning of the act or that it was actually bona fide engaged in farming practices within the meaning of the act. The true decision of the Circuit Court petitioner does not attack.

I.

THERE WAS NO SHOWING THAT PETITIONER WAS A FARMING CORPORATION OR ACTUALLY AND BONA FIDE ENGAGED IN FARMING PRACTICES WITHIN THE MEANING OF SECTION 75 OF THE BANKRUPTCY ACT.

The Circuit Court held that the burden was upon petitioner to show that it was a farming corporation and actually and bona fide engaged in farming, and inasmuch as it had failed to sustain that burden the District Court had properly dismissed the proceedings instituted by it.

Petitioner does not complain of that ruling. It contends that the Circuit Court decision was based upon

the ground that it had failed to show that it owned farming property and that inasmuch as it was prevented from so showing by the special master and the District Court, the opinion of the Circuit Court was erroneous. It suffices to state that the Circuit Court did not so hold.

There is no evidence in the record that petitioner was a farming corporation or bona fide engaged in farming when it filed its petition under section 75 of the Bankruptcy Act. On the contrary, the evidence clearly shows that it was trespassing on the Bank's property.

Even if we were to assume that petitioner's construction of the opinion of the Circuit Court was correct, a reading of the record (R. 146-184) will immediately disclose that it was not deprived of a hearing. No evidence that it offered was excluded by the special master. The fact is that with the exception of two judgment rolls, *which it did not designate as portions of the record upon appeal,* it offered no evidence in opposition to the petition filed by the Bank or to sustain the jurisdictional issue raised. It elected to abide by the result of the appeals it had taken from two state court judgments that had been rendered against it, in both of which proceedings the validity of the foreclosure sale admittedly was involved.

After these appeals were finally decided against it, it unsuccessfully sought to again litigate the matter on the theory that no hearing had been conducted by the special master and no evidence had been introduced before him (R. 77; 85; 90-91; 92; 94-95; 98; 100; 103).

As we have pointed out, a hearing was in fact held and abundant evidence was introduced which supports each and every finding made by the special master. Petitioner persisted in this error in stating its points to be relied upon on its appeal to the Circuit Court (R. 131). In fact, it was not until it petitioned this court for certiorari that it abandoned its contentions that there had been no evidence introduced before the special master to support the findings made by him.

II.

PETITIONER WAS NOT A FARMER INASMUCH AS IT DID NOT OWN AND WAS NOT LAWFULLY POSSESSED OF ANY FARMING PROPERTY.

It is clear that the laws of the State of California are determinative of the question of the validity of the foreclosure sale and the lawfulness of petitioner's possession of a small portion of the property involved.

The question of whether or not petitioner owned or was lawfully possessed of any farming property so as to permit it to obtain relief under section 75 of the Bankruptcy Act depends upon whether or not the foreclosure sale actually took place in 1932. That issue, as we have demonstrated, has been determined against petitioner in five separate actions or proceedings, exclusive of this proceeding.

Petitioner states that the decision of the court below "rested for the most part upon the finding of said state court that the matter of the validity of the Bank's title to said property had become *res judicata*

in the previous proceeding of petitioner under" section 75 of the Bankruptcy Act. It is true that the opinion of the state court was based *in part* upon that ground. However, there were several other independent grounds for its decision, any one of which, standing alone, was sufficient to support its determination that the foreclosure sale was validly held and that the petitioner was estopped from attacking the regularity and validity of said foreclosure sale.

In discussing the question of whether or not it was entitled to relief in this proceeding, petitioner contends

(1) that the deficiency judgment and the judgment renewing the same did not constitute an estoppel against petitioner as to the validity of the foreclosure sale;

(2) that the findings and judgment in the previous bankruptcy proceeding filed by the petitioner did not estop it from attacking the validity of the foreclosure sale;

(3) that the judgment in the last unlawful detainer case did not estop appellant from attacking the validity of the foreclosure sale.

We shall briefly discuss these points in the order stated, and in doing so shall not argue the points at any length because of the fact that each question was argued before the District Court of Appeal of the State of California in the last unlawful detainer case and decided by it. All the authorities cited and contentions made by the appellant in its brief filed on this appeal were made before the District Court of Appeal in the last unlawful detainer case and each of those

contentions were decided against it by the said District Court of Appeal. This court as we have stated denied certiorari in that case.

A. Both the Deficiency Judgment and the Judgment Renewing the Deficiency Judgment Constitute a Conclusive Estoppel as Against Petitioner in its Attempt to Again Litigate the Validity of the Foreclosure Sale.

Petitioner contends that the deficiency judgment was not *res judicata* because of the fact that the pleadings, findings and judgment in that case do not show on their face that the question of the validity of the foreclosure sale was an issue in or had actually been determined in that case. This same contention was made by the petitioner in the last unlawful detainer case and the same authorities relied upon in its brief filed with this court were there cited.

The District Court of Appeal stated (40 Cal. App. (2d) 620, 629-633) that the reporter's transcript in the deficiency action, which was also introduced in evidence in the hearing before the special master (R. 148) but was omitted from the printed record (R. 198-199) clearly showed that the question of whether or not the deed of trust had been foreclosed was an issue in that case and was actually decided by the court. The petitioner was represented in court at the trial of the deficiency action by its counsel and its President, Patrick McLaughlin (R. 191-197).

In the action to renew the deficiency judgment, the petitioner sought to set aside the deficiency judgment

and the foreclosure sale on the ground that no foreclosure sale had actually been held and that therefore the court did not have jurisdiction to entertain the action for the renewal of the deficiency judgment and also sought to quiet its title to the property (R. 39). No attack was made on the ground of extrinsic fraud, and the Bank's demurrer to the cross-complaint was sustained without leave to amend. After taking an appeal, the petitioner stipulated that the appeal should be dismissed in the event the judgment in the last unlawful detainer case was affirmed. The appeal was dismissed on November 16, 1940. (*Kirkpatrick v. McLaughlin etc. Co.*, 41 Cal. App. (2d) 954, 107 P.(2d) 99.)

B. The Judgment of Dismissal in the Former Proceedings Filed by Petitioner Under Section 75 of the Bankruptcy Act Constitutes a Conclusive Estoppel Against Petitioner in its Attempt to Again Attack the Validity of the Foreclosure Sale.

The District Court of Appeal in the last unlawful detainer action passed upon this contention of petitioner, in which case the same arguments and the same authorities were made and cited by petitioner. In that case the court held (40 Cal. App. (2d) 620, 625-629) that the Bankruptcy Court was presented with two questions, both of which went to its jurisdiction. First, was the petitioner actually bona fide engaged in farming; and secondly, was the petitioner the owner or lawfully possessed of any farming property to entitle it to invoke the provisions of section 75 of the Bankruptcy

Act. The District Court of Appeal further held that the decision of the Bankruptcy Court was *res judicata* on both grounds notwithstanding the fact that the Circuit Court of Appeals affirmed the judgment of dismissal on the sole ground that the petitioner was not engaged in farming.

Petitioner contends in its brief filed in this case, as it did before the Circuit Court, the District Court of Appeal and in its application for certiorari before this court from the judgment against it in the unlawful detainer case, that in view of the fact that the petitioner was not a farmer, the Bankruptcy Court did not have jurisdiction to decide any other issue presented to it. This argument loses sight of the fact that each point decided by the Bankruptcy Court went to the question of whether or not the petitioner was a farmer within the meaning of the Bankruptcy Act and whether or not the Bankruptcy Court had jurisdiction. Obviously, one who is not the owner or lawfully possessed of farming property is not bona fide engaged in farming, particularly where the alleged farmer does not profess to be farming any other property. As a matter of fact, the petitioner was trespassing on the Bank's property. (*Societa Italiana Di Mutua Beneficenza v. Burr* (C. C. A. 9), 71 F. (2d) 496.)

The state court's opinion to the effect that the question of whether the petitioner was the owner or legally possessed of farming property was equally jurisdictional is amply supported by the authorities. In *Wright v. Union Central Life Insurance Co.*, 304 U. S. 502, 508-509, 58 S. Ct. 1025, 1029-1030, this court stated:

"With the delivery of the deed, prior to any effective extension of the period of redemption, the purchaser's rights, flowing from the judicial sale, *were no longer affected by the court's jurisdiction of petitioner* and petitioner's estate under the Bankruptcy Act. Nothing in section 75 as it now stands indicates any intention that the Bankruptcy Courts assume control over land not previously within the jurisdiction of a Bankruptcy Court, and already completely divorced from any title of the debtor." (Italics ours.)

In *Union Joint Stock Land Bank v. Byerly*, 310 U. S. 1, 10-11, 60 S. Ct. 773, 777-778, 84 L. Ed. 1041, where the debtor as did the petitioner here had taken an appeal from the state court judgment the court stated:

"Since the foreclosure proceedings had been completed and title had passed thereunder prior to the filing of the debtor's petition for reinstatement, it would have been a vain thing to refer the cause to a conciliation commissioner for administration of property which no longer belonged to the debtor. * * *

It is said that, even where title has passed from the mortgagor in foreclosure proceedings before the filing of the petition, the debtor should be, if he so requests, adjudicated a bankrupt so that a trustee may, if so advised, challenge the validity of the sale. Here, however, there is no suggestion of any infirmity in petitioner's title save that the sale was made in violation of the prohibitions of the bankruptcy act. But that sale was made under leave of the bankruptcy court and it was within the State court's jurisdiction, when no bankruptcy

proceeding was pending, to confirm the sale and order delivery of a deed. If it erred in that respect its action was subject to correction by appeal but not subject to attack in a collateral proceeding. The fact is that the debtor appealed from the confirmation of the sale to the Court of Appeals of Madison County, Ohio, which affirmed the decree of the Common Pleas Court. An issue of fraud alleged to have been practiced upon the debtor to obtain his withdrawal of his original bankruptcy proceeding was there finally decided against him."

To the same effect:

Bastian v. Erickson, C. C. A. 10, 114 Fed. (2d) 338, 340-41;
In re Weis, D. C. Iowa, 10 Fed. Supp. 227, 229;
In re Knauff, D. C. Cal., 10 Fed. Supp. 786;
In re Randall, D. C. Penn., 20 Fed. Supp. 470;
In re Chrisman, D. C. Cal., 35 Fed. Supp. 282;
In re Bochme, D. C. Mont., 41 Fed. Supp. 426.

It is to be remembered that the petition filed by petitioner in the former proceedings under section 75 of the Bankruptcy Act alleged that it was a farming corporation, which allegation was sufficient to confer jurisdiction on the Bankruptcy Court until the facts proved otherwise. Consequently, a hearing on the issue of fact raised by the petition to dismiss filed by the Bank was necessary in order to determine whether or not petitioner was in fact a farmer and entitled to invoke the provisions of the act. Throughout that proceeding the petitioner claimed that it was a farmer and in fact so claimed before the Circuit Court of

Appeals. Consequently it cannot be claimed that the Bankruptcy Court lacked jurisdiction until such time as that court had determined the factual questions involved.

As we have stated, the District Court of Appeal held that the decision by the Bankruptcy Court on both questions was *res judicata* notwithstanding that on appeal the Circuit Court of Appeals affirmed the judgment of dismissal on the sole ground that the petitioner was not actually bona fide engaged in farming and could not farm in view of the fact that it had not paid its franchise tax. The District Court of Appeal held that a general affirmance of a judgment, notwithstanding the fact that the affirmance is limited to but one of the many grounds decided by the court below, nevertheless renders the judgment of the court below *res judicata* on each and every issue decided by it. The opinion by the District Court of Appeal in this respect is likewise amply supported by the authorities.

34 *C. J., Judgments*, 773;

State v. City of Cleveland, 60 O. App. 295, 22 N. E. (2d) 223, 226;

People v. Skidmore, 27 Cal. 287, 292-93;

Russell v. Russell, C. C. A. 3, 134 Fed. 840, cert. denied 198 U. S. 584, 49 L. Ed. 1173, 25 S. Ct. 802.

However, as we have stated, the question of whether or not the state court's decision in this respect was or was not correct is entirely beside the point. There were several other ample grounds for the decision by the District Court of Appeal in the last unlawful

detainer action to support its opinion that petitioner was estopped from seeking to attack the validity of the foreclosure sale. Those grounds of the court's decision the petitioner does not attack except to state that the issue of title was not there involved and that the decision was erroneous. Those points will be discussed later.

C. The Foreclosure Sale Was Not Conducted by an Unauthorized Person and Was Valid in All Respects.

In contending that the foreclosure sale was illegally held, petitioner blows both hot and cold. It contends throughout its brief that the Bankruptcy Court in the former proceedings instituted by the appellant under section 75 had no jurisdiction to decide any issues after it had once determined that the petitioner was not a farmer, yet it then seizes upon a portion of an isolated finding by the special master, which it contends the special master had no jurisdiction to make, and contends that the sale was illegal because the person who conducted the sale had not previously been properly authorized to do so.

The record in the former bankruptcy proceeding was introduced for the sole purpose of showing that the issues as to the title to the property had been passed upon in that proceeding and that the determination by the court in that proceeding constituted a conclusive estoppel against appellant (R. 151-152).

It is true that the special master there found that the sale had been conducted by one who had not previously been specifically authorized to do so, but the

special master went on to find *in the same finding* that the acts in conducting the sale were subsequently ratified by the trustee under the deed of trust (R. No. 8235, p. 32). The petitioner contends that the special master erred in making the latter portion of that finding.

Eliminating for a moment the question of whether or not the special master had the power or jurisdiction to make the finding, which petitioner must do in order to make this contention, it is obvious that whether or not the special master erred in making his finding that the holding of the sale was subsequently ratified by the trustee under the deed of trust did not go to the jurisdiction of the special master but would at best be but an error in judgment which could only be cured by a direct attack by appeal.

Union Joint Stock Land Bank v. Byerly, 310 U. S. 1, 60 S. Ct. 773, 84 L. Ed. 1041;

Buttars v. Utah Mortgage Loan Corp. (C. C. A. 10), 116 F. (2d) 622;

Chicot County Drainage Dist. v. Baxter State Bank, 308 U. S. 371, 60 S. Ct. 317, 84 L. Ed. 329;

Stoll v. Gottlieb, 305 U. S. 165, 59 S. Ct. 134, 83 L. Ed. 104.

The law of the State of California controls as to whether or not the trustee's sale was valid. In the last unlawful detainer case (40 Cal. App. (2d) 620, 633), the court held that under the laws of the State of California the appellant was estopped from claiming "that no sale was in fact made" inasmuch as the

provisions of the deed of trust made the recitals in the trustee's deed to the effect that a sale was actually conducted conclusive upon appellant.

It is also the law of the State of California that even though the sale had been conducted by one who was not previously specifically authorized to do so, such act in conducting the sale is ratified by the subsequent execution of the trustee's deed.

Harris v. Seidell, 1 Cal. App. (2d) 410;
Orloff v. Pece, 134 Cal. App. 434;
Kraemer v. Coward, 2 Cal. App. (2d) 506;
Bertschmann v. Covell, 205 Cal. 707;
Civil Code, Sec. 2307.

D. The Judgment in the Last Unlawful Detainer Action Constitutes a Conclusive Estoppel Against Petitioner's Present Attempt to Attack the Validity of the Foreclosure Sale.

Petitioner's argument that the judgment in the last unlawful detainer action is not conclusive against it is predicated upon the grounds that the state court erred in holding that the judgment in the former bankruptcy proceeding filed by appellant was *res judicata.*

As we have pointed out, however, there were several other grounds for the decision by the District Court of Appeal in the last unlawful detainer action, any one of which, standing alone, is sufficient to support its decision that the petitioner is estopped from attacking the validity of the foreclosure sale. Those independent grounds of the state court's decision were: First. That the recitals in the trustee's deed

as to the regularity of the foreclosure proceedings and the fact that the foreclosure sale was actually conducted were conclusive upon petitioner (40 Cal. App. (2d) 620, 633); Second. That the judgment in the deficiency action was *res judicata* as to the issue that the real property had been foreclosed (40 Cal. App. (2d) 620, 629, 633); and Third. That the judgment in the former proceedings under section 75 of the Bankruptcy Act constituted a conclusive estoppel against petitioner from contending that the foreclosure sale was not regularly held (40 Cal. App. (2d) 620, 625-29).

We have heretofore discussed the question of whether the third ground of the state court's decision was correct or not. However, the question of whether or not the District Court of Appeal erred in its decision on this point is purely academic inasmuch as it held that under the laws of the State of California the petitioner was estopped from attacking the validity of the foreclosure sale on several other grounds. The decision of the state court has become final and it conclusively stablished that the laws of this state preclude the appellant from attacking the validity of the foreclosure sale. That decision, as we have shown, is binding upon this court.

Erie Railroad Co. v. Tompkins, supra.

The other contention made by petitioner is that the action did not involve the question of title. The Bank's complaint in that action pleaded that it owned the property (R. 114) and petitioner's answer denied the allegation (R. 119). Regardless of this, admittedly

petitioner's only claim to the property is that no valid foreclosure sale was held. That issue did not have to be decided in an action to quiet title to be conclusive against petitioner. No claim is made that the issue as to the validity of the foreclosure sale was not there determined—merely that the action did not involve the question of title but merely the right to possession. We do not think further discussion necessary.

E. The Judgment in the Quiet Title Action Filed by the Petitioner is Conclusive of All Issues Raised by it in This Proceeding.

Petitioner does not mention the action to quiet title filed by it, apparently because it was filed and decided after the lower court had dismissed this proceeding. However, a certified copy of the judgment roll was filed with the Circuit Court. Hence, the issues here raised by petitioner have been decided against it in an action to quit title commenced by it.

III.

THE STIPULATION SIGNED BY COUNSEL FOR ALL PARTIES AGREEING THAT THE DECISION IN THE LAST UNLAWFUL DETAINER CASE AND IN THE KIRKPATRICK ACTION SHOULD BE CONCLUSIVE UPON THE PARTIES WAS PROPER AND DID NOT TRANSCEND THE POWERS OF THE COURT.

The Bank filed a petition praying for three alternative orders: that the bankruptcy proceedings be dismissed; that the real estate covered by the deed of trust be stricken from the schedules; or for leave to

further prosecute certain state court actions (R. 26-35). After the Bank had completed its case in support of its petition, Mr. Aram, the attorney for certain unsecured creditors, suggested that the third alternative of the Bank's petition be granted (R. 179-183) and after a recess to permit the then counsel for petitioner to discuss the question of whether or not the stipulation should be entered into (R. 108-109, 183) petitioner's counsel agreed to the stipulation. All counsel then proceeded to Mr. Aram's office to draw the stipulation, whereupon it was signed and filed with the conciliation commissioner (R. 109).

Petitioner's present counsel objected to the stipulation before the District Court on the sole ground that it had deprived petitioner of a hearing and that the matter should be re-referred to the special master for a hearing on the merits (R. 94-106). The facts are that a formal hearing was held and evidence was introduced that supports each and every finding made by the special master (R. 146-183) and that the president of the petitioner corporation actually had agreed to the stipulation in question (R. 108-109; 183).

However, whether or not the stipulation was entered into, it is clear that the Bankruptcy Court had the power to permit questions as to title to be litigated in the state court, and as this court has stated properly does so when complicated questions of state law are involved.

Thompson v. Magnolia Petroleum Co., 309 U. S. 478, 60 S. Ct. 628;

Ex parte Baldwin, 291 U. S. 610, 54 S. Ct. 551.

Petitioner claims that the Bankruptcy Court had summary jurisdiction to determine the question of title to the entire 6640 acres. This is another academic point inasmuch as the Bank personally appeared in the bankruptcy proceeding and therefore gave the Bankruptcy Court jurisdiction over its person. The fact remains, however, that the bankrupt had possession of but 600 acres of the property at the time it instituted bankruptcy proceedings, which it occupied as a trespasser, and the court at no time acquired summary jurisdiction of the remaining 6040 acres but for the Bank's appearance.

IV.

PETITIONER WAS GUILTY OF LACHES, AND ANY CLAIM THAT IT HAS TO THE PROPERTY IS BARRED BY THE STATUTE OF LIMITATIONS.

The special master in the first proceeding filed by the petitioner under section 75 of the Bankruptcy Act held that the petitioner had been guilty of laches, and its claim was barred by the statute of limitations (R. No. 8385, p. 31) and the same findings were made by the special master in this case (R. 62).

The evidence in the present proceeding shows that no proceeding was filed by the appellant seeking to attack the validity of the foreclosure sale until it filed its cross-complaint in the suit to renew the deficiency judgment, which was more than seven years after the foreclosure sale had taken place (R. 166-175). The record further shows that in the first two unlawful detainer actions the petitioner admitted the regularity

of the foreclosure sale and did not question the title of the Bank, but as a matter of fact the stockholders and officers of the appellant claimed as lessees a small portion of the property formerly covered by the deed of trust. In fact, in the first unlawful detainer action petitioner disclaimed as to 6040 acres of the 6640 involved (R. 189). The record further shows that 6640 acres of the property originally covered by the deed of trust was voluntarily surrendered to the Bank immediately after the foreclosure sale and that the petitioner has not been in possession of it and has not made any attempt to obtain possession of those 6640 acres for a period of more than seven years after the foreclosure sale took place. The record further shows that the Bank has paid the taxes on the property ever since the foreclosure sale (R. 47).

V.

CONCLUSION.

It is respectfully submitted that the petition for writ of certiorari be denied.

Dated, San Francisco, California,
December 17, 1941.

Respectfully submitted,
HERBERT W. ERSKINE,
Attorney for Respondent.

MORSE ERSKINE,
J. BENTON TULLEY,
KEYES & ERSKINE,
Of Counsel.